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REFORM OF THE FEDERAL CRIMINAL LAWS

HEARING
BEFORE THE
SUBCOMMITTEE ON
CRIMINAL LAWS AND PROCEDURES
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-THIRD CONGRESS
FIRST SESSION
ON
S. 1, S. 716, and S. 1400

MAY 2, 3, AND 23, 1973

PART VI

NATIONAL SECURITY, RULES OF CRIMINAL PROCEDURE, ANTI-
TRUST, ABORTION, TAX, INSURANCE BANKRUPTCY AND
APPELLATE REVIEW OF SENTENCING

Printed for the use of the Committee on the Judiciary



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REFORM OF FEDERAL CRIMINAL LAWS

Part VI

WEDNESDAY, MAY 2, 1973

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:15 a.m., in room 2228, Dirksen Senate Office Building, Senator Roman L. Hruska, presiding.

Present: Senators Hruska (presiding), Hart, and Cook.

Also present: G. Robert Blakey, chief counsel; Paul C. Summitt, deputy chief counsel; Dennis C. Thelen, assistant counsel; Kenneth A. Lazarus, minority counsel; and Mabel A. Downey, clerk.

Senator HRUSKA. The subcommittee will come to order.

In the absence of the chairman of the committee, Senator McClellan, who is busy chairing subcommittee hearings on Defense appropriations this morning, this Senator has been asked to preside.

Today the Subcommittee on Criminal Laws and Procedures resumes its hearings on S. 1 and S. 1400, two bills to revise, reform, and codify the Federal criminal laws.

The focus of our inquiry this morning will be on certain of the provisions concerning offenses involving national security contained in chapter 11 of S. 1400, the Administration's proposed criminal Code Reform Act of 1973, and in chapter 5 of S. 1, the Criminal Justice Codification, Revision, and Reform Act of 1973.

More specifically, we will want to concentrate on proposed sections 1121 through 1126 of S. 1400 and sections 2-5B7 and 2-5B8 of S. 1, dealing with espionage and protection against unauthorized disclosure of national defense and classified information.

I think it is no exaggeration to say that this is an area of the law of utmost concern to all of us, from both within and without the Government.

It is also an area in which difficult questions abound, questions to which there are no easy solutions.

The difficulties arise, it seems to me, because we are dealing here with two fundamentally competing interests: protection of our national security on the one hand, and preservation of an informed public opinion on the other.

To quote from the thoughtful opinion of Mr. Justice Stewart in the *New York Times* case:

It is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality

and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident. (*New York Times Co. v. United States*, 403 U.S. 713, 728 (1971)).

On the other hand, as Justice Stewart pointed out, secrecy is by no means the only consideration. Quoting again from his *New York Times* opinion:

When everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained. (*Id.* at 729.)

Thus, we are faced with the difficult task of balancing the need for an effective internal security system against the desirability of maintaining an informed electorate.

The provisions of S. 1400 which we will be discussing this morning represent one considered approach to this problem. In the few weeks since Senator McClellan and I introduced S. 1400, these proposals have already received considerable attention and comment.

Much of the comment reflects the understandable concern of those who fear that the Administration's proposals will stifle the public's legitimate right to be kept informed of what its Government is doing.

Some have gone so far as to suggest that the bill would drastically alter present law and would, in effect, impose on this Nation a "national secrecy act."

To these critics of S. 1400 let me say that I have examined the proposed national security provisions very carefully. To me, they do not appear to represent a radical departure from what I understand to be present law. More important, I believe that these proposals represent a conscientious attempt to arrive at a reasonable solution in the area, a balanced solution which eschews the notion of secrecy for its own sake.

Obviously, reasonable minds may differ as to the wisdom of these proposed statutes. Indeed, I am not prepared to endorse them fully without further study and consideration of available alternatives. But before we arrive at any firm judgments, let us be certain that we understand these proposals, how they relate to existing law and how they would operate in practice.

To help us find the answers to these questions, we have invited to testify before us today Mr. Henry E. Petersen, Assistant Attorney General, Criminal Division, Department of Justice, who will be represented by Mr. Kevin Maroney, a Deputy Assistant Attorney General under Mr. Petersen.

Mr. Maroney has a long background in the internal security area.

Mr. Jack Landau, a representative of the Reporters Committee for Freedom of the Press, will also testify this morning.

We welcome you gentlemen, and look forward to hearing your views.

Before we proceed to our first witness, I offer for the record a memorandum in response to criticisms concerning certain sections of S. 1400 dealing with national security and classified information offenses, and copies of Executive Orders numbered 11652 and 11714.

[Information referred to above follows:]

MEMORANDUM—THE ESPIONAGE SECTIONS OF THE PROPOSED FEDERAL
CRIMINAL CODE, S.1400.

This memorandum is prepared in answer to criticisms that have been made by members of Congress and by representatives of the press concerning certain espionage sections of the proposed Criminal Code Revision contained in S.1400. The memorandum will describe the proposed sections, compare the proposed statutes to the provisions of present law, and will discuss the criticisms which have been made.

I. THE RELEVANT PROPOSED ESPIONAGE SECTIONS

The espionage provisions of the proposed Code are §§1121-1126, with the latter section being a general definition section applicable to the espionage statutes. Most relevant to this memorandum are Sections 1124 and 1122.

A. Section 1124

This proposed section makes it an offense for a person who is or has been in authorized possession of classified information or has obtained such information as a result of status as a Federal public servant to knowingly communicate such information to a person not authorized to receive it, that it is not a defense that the information was improperly classified at the time of its classification or at the time of the offense, and that the recipient of the classified information is not subject to prosecution either as an accomplice or as a conspirator. The section also provides that the communication of the information to a regularly constituted committee of the Congress pursuant to lawful demand is not prohibited. The punishment is seven years imprisonment if the person to whom the information is communicated is an agent of a foreign power and is three years imprisonment in any other case.¹

As noted, the statute proscribes a *knowing* communication of such information. The general culpability section, §302 of the proposed Code, provides that:

A person acts knowingly, or with knowledge, with respect to his conduct when he is aware of the nature of his conduct. A person acts knowingly, or with his knowledge, with respect to circumstances surrounding his conduct when he is aware or believes that the circumstances exist, or is aware of a high probability of their existence, or intentionally avoids knowledge as to their existence. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware or believes that his conduct is substantially certain to cause the result.

B. Section 1122

Proposed §1122 relates, not to classified information, but to national defense information. Section 1122 provides that a person is guilty of an offense if he knowingly communicates information "relating to the national defense" to a person not authorized to receive it. The basic difference between the two proposed sections is, of course, that under the latter, §1122, the Government would have the burden of proving that the information in fact related to the national defense while under the former, §1124, it would have the burden of proving that the information was classified. In view of the definition of classified information in proposed §1126, such proof would include the fact that the document or information at issue had been marked or designated pursuant to authority.²

C. General Comments

As will be discussed in more detail in the next section of this memorandum, the only departure from present law in these proposed sections is found in

¹ Proposed Section 1125 makes it an offense for an agent of a foreign power to obtain classified information he is not authorized to receive. This section has not been criticized.

² The section could not, then, apply to documents which had been stamped classified by someone without authority to classify or who was not purporting to act in accordance with such authority.

§1124 and, more specifically, in that section's applicability to all individuals having received classified information pursuant to authority being liable for communication of that information to anyone not authorized to receive it. Present law prohibits either (1) the communication of a *specific and limited type of classified information* to anyone not authorized to receive it, or (2) the communication of any classified information *only* by Government employees and *only* to agents of a foreign power or members of specified Communist organizations.

The need for a statute prohibiting the communication of classified information arises from the fact that in prosecutions under the general espionage laws, it is the Government's burden to demonstrate that the information at issue in fact relates to the national defense. Therefore, in order to criminally prosecute under other statutes, it is necessary to disclose the very information which the law seeks to protect. While it is true that in many cases there will have already been a communication of the information to someone not authorized to receive it or, more specifically, to someone acting for a foreign government, it is also true that in these circumstances the initiation of prosecution and the disclosure of the information in court with proof that "it relates to the national defense" constitutes a validation of the information transmitted in addition to providing for broader communication of the information to, for example, other foreign governments. In brief, any such prosecution requires the Government to endanger national security in order to protect national security.

The proposed statute relating to disclosing classified information has been very carefully limited. Only those individuals who have received the information in a position of trust, individuals well aware of their obligation toward classified information, may be liable for the offense. The statute by its terms specifically excludes the unauthorized recipient of classified information from possible prosecution.³

II. THE RELEVANT PROVISIONS OF PRESENT LAW

A. *Statutes related to proposed Section 1124 prohibiting the disclosure of classified information.*

As just discussed, Section 1124 does constitute some departure from the present statutes. The statutes relating to the proposed section are 18 U.S.C. 798, 50 U.S.C. 783(b), and 42 U.S.C. 2277.

1. *50 U.S.C. 783(b)*. This statute makes it a crime for any Government employee or officer, or an officer or employee of any corporation the stock of which is owned in major part by the United States, to communicate classified information to any person whom the individual has reason to believe to be an agent of any foreign government or an officer or member of specified Communist organizations. The Communist organizations include the Communist Party itself, Communist front organizations or Communist infiltrated organizations as defined in the Internal Security Act of 1950, 50 U.S.C. 782. All three of these organizations can and do include within their memberships citizens of the United States. The statute, 50 U.S.C. 783(b), is not limited by its terms to those Government employees or officers having received classified information pursuant to authority. This statute, then, insofar as the individuals to whom it can be applicable casts a broader net than the proposed Section 1124 which is intentionally limited to individuals who have received the information lawfully and under a condition of trust. Of course, it is more limited than the proposed Section in that the communication must be to agents of a foreign government or to members of specified Communist organizations.

2. *18 U.S.C. 798*. This Section makes it a crime for anyone to knowingly and willfully communicate to an unauthorized person classified information relating to communications of intelligence. This Section then is broader than the proposed Section 1124 insofar as it is applicable to *anyone* who communicates such information rather than being limited to those who received the information in an authorized manner and it is consistent with the proposed Section 1124 in that the proscribed communication may be to any unauthorized person. It is narrower than the proposed Section, however, in the type of classified information which it concerns. This narrowing is not as significant as it may ap-

³ Of course, a recipient may be prosecuted under the general espionage statutes, if the Government is willing to disclose the information in order to establish that it related to the national defense.

pear upon a first reading of the statute. This is so because the classified information protected also includes information obtained by the process of communications intelligence from any foreign government.

3. *42 U.S.C. 2277.* A third statute relevant to the proposed Section 1124 is 42 U.S.C. 2277 which makes it a crime for anyone who is or has been a Government employee or a member of the Atomic Energy Commission or of the Armed Forces or who is or has been a contractor or an employee of a contractor of the AEC or the United States or is or has been an employee of a licensee of the AEC to communicate any Restricted Data to any person not authorized to receive such Restricted Data. Under this Section the burden of proof should only be showing that the information was classified as Restricted Data and satisfied the definition of Restricted Data in general terms, rather than having to disclose the content of the information.⁴

This brief review of the three statutes indicates that the proposed Section 1124, while an extension of present statutes, is not a radical departure from present law. Moreover, since Section 1124 is the only Section in the proposed Code prosecuting the disclosure of classified information and it specifically excludes recipients from its application the Section also narrows these Sections of current law since, under each of those Sections, prosecution as an aider or abettor and/or as a conspirator is possible either under 18 U.S.C. 2, permitting punishment as a principle all who aids, abets, counsels, commands, induces or procures a commission of an offense against the United States, or the Federal conspiracy Section, 18 U.S.C. 371, or, in the case of 42 U.S.C. 2277, by the inclusion of a specific conspiracy prohibition in the statute itself.

These statutes are important as demonstrating Congressional authority for and Congressional concern about the protection of classified information.

B. Statutes Related to Proposed §1122 Prohibiting the Disclosure of National Defense Information.

Unlike §1122 relating to classified information, §1122 does not constitute an extension of the present law. It is a recodification and redrafting of the provisions now found in 18 U.S.C. 793(d) and 793(e), and 18 U.S.C. 793(c).

1. *18 U.S.C. 793(d).* This present statute provides that anyone having lawful possession of any document, writing, code book, signal book, or other specified item "relating to the national defense," or having lawful possession of "information relating to the national defense which information and the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation" willfully communicates or attempts to communicate such items or such information to any person not entitled to receive it or willfully retains such items or such information and fails to deliver it on demand is guilty of a crime. It must be carefully pointed out that the phrase "which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation" only modifies the last item specified "information" so that as to the enumerated items, including documents, photographs, notes, etc., it is only necessary to prove that those items related to the national defense and that the individual willfully communicated them to a person not entitled to receive them.⁵

2. *Section 793(e):* This Section is identical to 793(d) except that it applies to anyone having *unauthorized* possession of the items specified relating to the national defense or unauthorized possession of information relating to the national defense which information the individual has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation.

3. *18 U.S.C. 793(c).* This Section applies to the same specified types of tangible form such as documents, writings, code books, etc. of "anything connected with national defense" and makes it a crime to receive or obtain or attempt or agree to receive or obtain national defense information for the purpose of obtaining such information and with knowledge or reason to believe it

⁴ This concept would also apply to other statutes, with much more severe penalties, which makes it a crime to communicate Restricted Data with specific harmful intent, 42 U.S.C. Sections 2274, 2275.

⁵ The district court in the *New York Times* case refused to accept this interpretation. In the Supreme Court decision in that case, however, Justices White and Stewart specifically confirmed our view of the statute, see *New York Times Company v. United States*, 403 U.S. 713 at 737-738. The plain language of the statute and its punctuation clearly support our interpretation. See Senate Report 427, 80th Cong., 1st Session (1949) p. 7; House Report 3112, 81st Congress, 2nd Session (1950) p. 52. *Cf., United States v. Coplon*, 88 F. Supp. 910 (S.D. N.Y., 1949).

has been or will be obtained, taken, made, or disposed of by any person contrary to the provisions of this chapter. This Section is carried forward in the proposed code because, unlike §1224 relating to classified information, proposed §1122 does not exclude prosecution of aiders and abettors or conspirators and the activity proscribed in 18 U.S.C. 793(c) would in most cases be sufficient to establish aiding and abetting or to establish a conspiracy.

4. Information relating to the National Defense.

At this point it is necessary to examine what is meant by the phrase "relating to the national defense." Since that phrase has been used in the proposed draft the past legislative gloss and court interpretations of the phrase are intended to be carried forward in the proposed statute. The explanation of the phrase in the proposed general definitions section §1126, does not attempt to define the phrase but merely indicates the types of information which the phrase is to include. The appropriate subsection of §1126 also imposes a requirement that the information must involve the security of the United States, see §1126(g) (10).

The two leading cases which have interpreted the phrase are *Gorin v. United States*, 312 U.S. 19 and *United States v. Heine*, 151 F. 2d 813 (C.A. 2). The retention of the phrase "relating to the national defense" incorporates the concepts of those cases. This means that the question of the connection of the information with the national defense is a question of fact to be determined by the jury and the jury decides the sensitivity of the information in question regardless of whether the government has classified the information. The prosecution must attempt to convince the jury that the information disclosed was information connected with or related to our military, naval, and air establishments and related activities of national preparedness and the jury can examine documents and/or must hear witnesses testimony as to the contents of documents or other information and the significance of same to the national defense.

The courts have held that the term "national defense" is a generic concept of broad connotations referring to the military and naval establishments and the related activities of national preparedness, *Gorin v. United States*, *supra*, 312 U.S. at 28. The connection with the national defense must not be strained or arbitrary, but must be reasonable and direct, *id.* at 30-31.

Another result of the continued use of the phrase is that the defenses that were available under prior law are similarly available in the proposed code. The courts have held that no one can be convicted of violating §18 U.S.C. 793 (and 18 U.S.C. 794, the other general espionage statute) if the information was made available to the public; or if the government did not attempt to restrict its dissemination; or if the information was available to everyone from lawfully accessible sources, see *United States v. Heine*, *supra*.

5. General Comments.

In view of the provision of 18 U.S.C. 793(d) and (e) and of 18 U.S.C. 793(c), just discussed, the only manner in which the proposed §1121 differs from current law is in its blanket prohibition on the communication of "information relating to the national defense." This is in contrast to the requirements of 794(d) and (e) that when the information is something other than tangible objects such as code books, documents, photographs and notes, etc. it must be further shown that the possessor of the information had reason to believe it could be used to the injury of the United States or to the advantage of any foreign power. However, the concept of "national defense information" and the defenses that have been judicially drafted to that concept result in making this an insubstantial difference. Establishing that the information related to the national defense and did not fall within the enumerated defenses would appear to be tantamount to showing that the information was of a type that the individual would have reason to believe could be used to the injury of the United States or to the advantage of any foreign nation. And, under the proposed section, the communication must be done "knowingly" which culpability element is described above, p. 2, *supra*.

III. CRITICISM OF THE PROPOSED SECTIONS

(1) Critics claim that the proposed legislation would punish Government officials who disclosed almost any kind of defense and foreign policy information whether or not its disclosure would endanger national security.

As noted, the section related to the communication of classified information would require that that information be classified pursuant to the authority of statute or executive order. Executive Order 11652 issued by the President in March of 1972 significantly tightened the classification procedures by limiting the number of individuals who had the authority to classify and by providing for stricter standards for the classification of information. Most important here, moreover, that Executive Order provided for a specific and effective review procedure to insure that the standards of the Executive Order were not violated. The Executive Order in Section 7 establishes an Interagency Classification Review Committee and charges it to take action to insure compliance with the Executive Order and that same section of the Executive Order, Section 7, directs each department handling classified information to designate appropriate officials to insure strict compliance with the Order and mandates the creation of Departmental Committees to oversee each Department's administration of the Executive Order. In setting up the Government-wide review committee and the departmental committees, the Executive Order specifically states that those committees should have the authority to act on all suggestions and complaints with respect to the actions of each and every department in administering the Executive Order.

This Executive Order for the first time provides for administrative penalties for any officer or employee of the United States who unnecessarily classifies or overclassifies information and directs the review committees just discussed to make a report to the head of the department concerned in any case where they find that unnecessary classification or overclassification has occurred. These provisions are set forth in Section 13 of the Executive Order.

In short, the Executive Order is an attempt to insure that the only information classified is information which satisfies the strict standards of the Order, standards contained in the Order's definitions of the classification categories "Top Secret," "Secret," and "Confidential." These standards are set forth in Section 1 of the Executive Order.

In view of the strict prohibitions of the Executive Order the proposed Code does not seek to punish the disclosure of "any kind of defense and foreign policy information whether or not its disclosure would endanger national security." Insofar as comments are made that the Government could punish a Government employee who disclosed information concerning fraud or deceit or matters such as cost overruns under the proposed Section 1124, there are two answers. First, as just discussed, Executive Order 11652 sets up procedures by which a Government employee who felt that information was classified for improper purposes could bring it to the attention not only of his superior but of the Departmental Review Committee and indeed to the Interagency Review Committee. Secondly, even if it were assumed that these procedures would not work concerning information relating to fraud, deceit or inefficiency and a Government employee communicated such information so that remedial steps could be taken, any "retaliatory prosecution" would, as a practical matter, be highly unlikely in view of the impact of public opinion and in view of the aggressive steps the press and the Congress itself could and would take to highlight such retaliation.

In view of these considerations and in view of the determined attempt of the President to provide a well-managed, workable and tightly controlled classification system, and in view of the considerations just discussed, there is little merit to the criticism that the proposed statutes would permit staggering penalties for the disclosure of information even when the information is totally misclassified or classified only to prevent public knowledge of waste, error, dishonesty or corruption. The courts have pointed out that the responsibility for the protection of classified information rests with the Executive branch. They have similarly pointed out that the judiciary should be reluctant to interfere with the Executive determinations in this area stating that "in a mature democracy, [such choices] must be made by the Executive branch and not by the Judicial. If too many mistakes are made, the electorate will in due time reflect its dissatisfaction with the results achieved," *Greene v. McElroy*, 254 F.2d 944, at 954, reversed on other grounds, 360 U.S. 974. In addition to the protection which would be afforded by the check by the electorate upon attempts to punish individuals for seeking to disclose waste, error, dishonesty or corruption would be the check that Congress itself would have. First, the proposed section 1124 specified provides that it is not a violation of the statute to communicate the information to a duly authorized committee of Congress pur-

suant to a lawful demand. Second, if the statute is used in any case to protect information other than that related to the security of our Country, Congress may repeal the criminal sanctions contained in 1124.

(2) It has been claimed that the proposed Code would punish newsmen who received information unless they promptly reported the disclosure and returned the material to Government officials whether or not the disclosure of that information would endanger national security.

The proposed Code would only permit a prosecution where the Government was willing to and able to prove that the information related to the national defense. Such prosecution would be possible under proposed sections 1122 and 1123. As pointed out above, these sections carefully and intentionally carry forward the concepts of "information relating to the national defense" with all the limitations and safeguards provided by the legislative and litigative gloss on that phrase. Moreover, the proposed sections 1122 and 1123 are but reenactments and recodifications of current law and absolutely no extension or expansion of current law is intended. See the present sections 18 U.S.C. 793(e), (d) and (e).

(3) It is stated that the proposed Code would punish not only reporters but all responsible officials of the publication or broadcasting company who participated in making the unauthorized information public.

Again, such prosecutions could only be undertaken if the Government was able to establish that the information in fact related to the national defense. Again, as is pointed out by Justice White and Justice Stewart's opinions in the *New York Times* case, *supra*, that is exactly the situation in current law.

(4) It is also stated that the proposed Code would punish Government employees who knew of colleagues unauthorized disclosure and failed to report their colleagues action.

Here again this could only be accomplished under proposed section 1123 which intentionally and carefully requires the Government to establish that the information related to the national defense. Again, this is but a recodification of current law. See 18 U.S.C. 793(f).

(5) It is next stated that most penalties would be imposed on actions which are not now considered crimes but are, instead, the "applauded work of investigative journalists."

The section relating to the communication of classified information, 1124, is specifically limited so as to exclude any possible application to the recipient of that information. The only prosecutions that could be brought against "investigative journalists" under the proposed Code are exactly those that could be brought under the current statutes. Since those statutes have been on the books for either 60 or 20 years depending on which sections of the espionage statutes are involved and have not been used to subject the "applauded work of investigative journalists" to prosecution, it is difficult to understand what change will be brought about by the mere recodification of current law.

(6) It has also been commented that no law now gives the Government the power to prosecute newsmen not only for revealing what they determined the public should know but just for possessing information the Government says they should not have.

This, of course, has been answered in reply to some of the previous criticism but, since it is a repetitive charge, it should be noted that the proposed Code could only permit punishment of newsmen for revealing information or for possessing information when the Government is able to carry the burden of proving that the information in fact relates to the national defense. The statement that no such law now gives the Government the power to prosecute in these circumstances can just not be supported in light of the provisions of 18 U.S.C. 793 and specifically subsections (c), (d) and (e) of that section, and in light of the clear and well-reasoned opinion of Mr. Justice White concurred in by Mr. Justice Stewart, Mr. Justice Blackmun, and Mr. Chief Justice Burger in the *New York Times* case, *supra*.

(7) It has been stated that all of the sections of current law which are not restricted to the communication of classified information but relate to the compromise of national defense information are limited in two ways: they deal with strictly military related matters and/or they require an intent to injure the United States or to aid a foreign nation.

The observation is incorrect on both limitations. As set forth in the discussion concerning the phrase "information related to the national defense," *supra*, that phrase has a legislative and litigative gloss which gives the phrase

a broader meaning than strictly military related matters, though it is limited to matters reasonably related to national defense and national preparedness. In any event, however, the proposed Code intentionally and carefully contains the same limitations by the use of the same phraseology. Next, as the discussion of 18 U.S.C. 793(c), (d) and (e) demonstrates, the current law is not limited in application only to those communications of national defense information done with an intent to injure the United States or to aid a foreign nation.

(8) It is also stated that the proposed legislation is an attempt to jail reporters for publishing classified information even if that information was improperly classified, related to abuse, dishonesty and waste in the Federal Government, and it served the national interest to make it public.

Again proposed section 1124, relating to classified information, is strictly limited so as not to apply to the newspaper reporters who may publish classified information which they receive. The only prosecution against the press permitted by the proposed Code is, as has been already discussed numerous times, in those instances where the Government establishes that the information relates to the national defense and this is strictly in accordance with current law.

(9) It is claimed that the proposed section 1124, insofar as it does exclude reporters from its application, would deny to reporters their Fifth Amendment right to refuse to respond to questions concerning the sources of classified information in their possession.

There are two answers to this criticism. First, as discussed, a reporter may under both present law and the proposed code be prosecuted for the disclosure of information related to the national defense. Information classified in accordance with the Executive Order would, in almost every conceivable instance, be information related to the national defense, or at the very least, there would be a reasonable presumption that it was, so that a reporter would retain his Fifth Amendment privilege because of the possible applicability of other criminal statutes. Secondly, insofar as the concern is that the reporter may be forced to identify other individuals engaged in crime, the Fifth Amendment has never been held to permit one to protect a third party.

THE WHITE HOUSE,

March 8, 1972.

EXECUTIVE ORDER 11652

Section 1. Security Classification Categories. Official information or material which requires protection against unauthorized disclosure in the interest of the national defense or foreign relations of the United States (hereinafter collectively termed "national security") shall be classified in one of three categories, namely "Top Secret," "Secret," or "Confidential," depending upon the degree of its significance to national security. No other categories shall be used to identify official information or material as requiring protection in the interest of national security, except as otherwise expressly provided by statute. These classification categories are defined as follows:

(A) "*Top Secret.*" "Top Secret" refers to that national security information of material which requires the highest degree of protection. The test for assigning "Top Secret" classification shall be whether its unauthorized disclosure could reasonably be expected to cause exceptionally grave damage to the *national security*. Examples of "exceptionally grave damage" include armed hostilities against the United States or its allies; disruption of foreign relations vitally affecting the national security; the compromise of vital national defense plans or complex cryptologic and communications intelligence systems; the revelation of sensitive intelligence operations; and the disclosure of scientific or technological developments vital to national security. This classification shall be used with the utmost restraint.

(B) "*Secret.*" "Secret" refers to that national security information or material which requires a substantial degree of protection. The test for assigning "secret" classification shall be whether its unauthorized disclosure could reasonably be expected to cause serious damage to the *national security*. Examples of "serious damage" include disruption of foreign relations significantly affecting the national security; significant impairment of a program or policy

directly related to the national security; revelation of significant military plans or intelligence operations; and compromise of significant scientific or technological developments relating to national security. The classification "Secret" shall be sparingly used.

(C) "*Confidential*." "Confidential" refers to that national security information or material which requires protection. The test for assigning "Confidential" classification shall be whether its unauthorized disclosure could reasonably be expected to cause damage to the *national security*.

OFFICE OF THE
WHITE HOUSE PRESS SECRETARY,
March 8, 1972.

EXECUTIVE ORDER

CLASSIFICATION AND DECLASSIFICATION OF NATIONAL SECURITY INFORMATION AND MATERIAL

The interests of the United States and its citizens are best served by making information regarding the affairs of Government readily available to the public. This concept of an informed citizenry is reflected in the Freedom of Information Act and in the current public information policies of the executive branch.

Within the Federal Government there is some official information and material which, because it bears directly on the effectiveness of our national defense and the conduct of our foreign relations, must be subject to some constraints for the security of our Nation and the safety of our people and our allies. To protect against actions hostile to the United States, of both an overt and covert nature, it is essential that such official information and material be given only limited dissemination.

This official information or material, referred to as classified information or material in this order, is expressly exempted from public disclosure by Section 552(b)(1) of Title 5, United States Code. Wrongful disclosure of such information or material is recognized in the Federal Criminal Code as providing a basis for prosecution.

To ensure that such information and material is protected, but only to the extent and for such period as is necessary, this order identifies the information to be protected, prescribes classification, downgrading, declassification and safeguarding procedures to be followed, and establishes a monitoring system to ensure its effectiveness.

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, it is hereby, ordered:

Section 1. Security Classification Categories. Official information or material which requires protection against unauthorized disclosure in the interest of the national defense of foreign relations of the United States (hereinafter collectively termed "national security") shall be classified in one of three categories, namely "Top Secret," "Secret," or "Confidential," depending upon the degree of its significance to national security. No other categories shall be used to identify official information or material as requiring protection in the interest of national security, except as otherwise expressly provided by statute. These classification categories are defined as follows:

(An) "*Top Secret*," "Top Secret" refers to that national security information or material which requires the highest degree of protection. The test for assigning "Top Secret" classification shall be whether its unauthorized disclosure could reasonably be expected to cause exceptionally grave damage to the national security. Example of "exceptionally grave damage" include armed hostilities against the United States or its allies; disruption of foreign relations vitally affecting the national security; the compromise of vital national defense plans or complex cryptologic and communications intelligence systems; the revelation of sensitive intelligence operations, and the disclosure of scientific or technological developments vital to national security. This classification shall be used with the utmost restraint.

(B) "*Secret*," "Secret" refers to that national security information or material which requires a substantial degree of protection. The test for assigning "Secret" classification shall be whether its unauthorized disclosure could reasonably be expected to cause serious damage to the national security. Exam-

ples of "serious damage" include disruption of foreign relations significantly affecting the national security; significant impairment of a program or policy directly related to the national security; revelation of significant military plans or intelligence operations; and compromise of significant scientific or technological developments relating to national security. The classification "Secret" shall be sparingly used.

(C) "*Confidential*," "Confidential" refers to that national security information or material which requires protection. The test for assigning "Confidential" classification shall be whether its unauthorized disclosure could reasonably be expected to cause damage to the national security.

Section 2. Authority to Classify. The authority to originally classify information or material under this order shall be restricted solely to those offices within the executive branch which are concerned with matters of national security, and shall be limited to the minimum number absolutely required for efficient administration. Except as the context may otherwise indicate, the term "Department" as used in this order shall include agency or other governmental unit.

(A) The authority to originally classify information or material under this order as "Top Secret" shall be exercised only by such officials as the President may designate in writing and by:

(1) The heads of the Departments listed below;

(2) Such of their senior principal deputies and assistants as the heads of such Departments may designate in writing; and

(3) Such heads and senior principal deputies and assistants of major elements of such Departments, as the heads of such Departments may designate in writing.

Such offices in the Executive Office of the President as the President may designate in writing: Central Intelligence Agency; Atomic Energy Commission; Department of State; Department of the Treasury; Department of Defense; Department of the Army; Department of the Navy; Department of the Air Force; United States Arms Control and Disarmament Agency; Department of Justice; National Aeronautics and Space Administration.

(B) The authority to originally classify information or material under this order as "Secret" shall be exercised only by:

(1) Officials who have "Top Secret" classification authority;

(2) Such subordinates as officials with "Top Secret" classification authority under (A) (1) and (2) above may designate in writing; and

(3) The heads of the following named Departments and such senior principal deputies or assistants as they may designate in writing.

Department of Transportation.

Federal Communications Commission.

Export-Import Bank of the United States.

Department of Commerce.

United States Civil Service Commission.

United States Information Agency.

General Services Administration.

Department of Health, Education, and Welfare.

Civil Aeronautics Board.

Federal Maritime Commission.

Federal Power Commission.

National Science Foundation.

Overseas Private Investment Corporation.

(C) The authority to originally classify information or material under this order as "Confidential" may be exercised by officials who have "Top Secret" or "Secret" classification authority and such officials as they may designate in writing.

(D) Any Department not referred to herein and any Department or unit established hereafter shall not have authority to originally classify information or material under this order, unless specifically authorized hereafter by an Executive order.

Section 3. Authority to Downgrade and Declassify. The authority to downgrade and declassify national security information or material shall be exercised as follows:

(A) Information or material may be downgraded or declassified by the official authorizing the original classification, by a successor in capacity or by a supervisory official of either.

(B) Downgrading and declassification authority may also be exercised by an official specifically authorized under regulations issued by the head of the Department listed in Sections 2(A) or (B) hereof.

(C) In the case of classified information or material officially transferred by or pursuant to statute or Executive order in conjunction with a transfer of function and not merely for storage purposes, the receiving Department shall be deemed to be the originating Department for all purposes under this order including downgrading and declassification.

(D) In the case of classified information or material not officially transferred within (C) above, but originated in a Department which has since ceased to exist, each Department in possession shall be deemed to be the originating Department for all purposes under this order. Such information or material may be downgraded and declassified by the Department in possession after consulting with any other Departments having an interest in the subject matter.

(E) Classified information or material transferred to the General Services Administration for accession into the Archives of the United States shall be downgraded and declassified by the Archivist of the United States in accordance with this order, directives of the President issued through the National Security Council and pertinent regulations of the Departments.

(F) Classified information or material with special markings, as described in Section 8, shall be downgraded and declassified as required by law and governing regulations.

Section 4. Classification. Each person possessing classifying authority shall be held accountable for the propriety of the classifications attributed to him. Both unnecessary classification and over-classification shall be avoided. Classification shall be solely on the basis of national security considerations. In no case shall information be classified in order to conceal inefficiency or administrative error, to prevent embarrassment to a person or Department, to restrain competition or independent initiative or to prevent for any other reason the release of information which does not require protection in the interest of national security. The following rules shall apply to classification of information under this order:

(A) *Documents in General.* Each classified document shall show on its face its classification and whether it is subject to or exempt from the General Declassification Schedule. It shall also show the office of origin, the date of preparation and classification and, to the extent practicable, be so marked as to indicate which portions are classified, at what level, and which portions are not classified in order to facilitate excerpting and other use. Material containing references to classified materials, which references do not reveal classified information, shall not be classified.

(B) *Identification of Classifying Authority.* Unless the Department involved shall have provided some other method of identifying the individual at the highest level that authorized classification in each case, material classified under his order shall indicate on its face the identity of the highest authority authorizing the classification. Where the individual who signs or otherwise authenticates a document or item has also authorized the classification, no further annotation as to his identity is required.

(C) *Information or Material Furnished by a Foreign Government or International Organization.* Classified information or material furnished to the United States by a foreign government or international organization shall either retain its original classification or be assigned a United States classification. In either case, the classification shall assure a degree of protection equivalent to that required by the government or international organization which furnished the information or material.

(D) *Classification Responsibilities.* A holder of classified information or material shall observe and respect the classification assigned by the originator. If a holder believes that there is unnecessary classification, that the assigned classification is improper, or that the document is subject to declassification under this order, he shall so inform the originator who shall thereupon re-examine the classification.

Section 5. Declassification and Downgrading. Classified information and material unless declassified earlier by the original classifying authority, shall be declassified and downgraded in accordance with the following rules:

(A) *General Declassification Schedule.*—(1) "*Top Secret.*"—Information or material originally classified "*Top Secret*" shall become automatically down-

graded to "Secret" at the end of the second full calendar year following the year in which it was originated, downgraded to "Confidential" at the end of the fourth full calendar year following the year in which it was originated, and declassified at the end of the tenth full calendar year following the year in which it was originated.

(2) "*Secret*."—Information and material originally classified "Secret" shall become automatically downgraded to "Confidential" at the end of the second full calendar year following the year in which it was originated, and declassified at the end of the eighth full calendar year following the year in which it was originated.

(3) "*Confidential*."—Information and material originally classified "Confidential" shall become automatically declassified at the end of the sixth full calendar year following the year in which it was originated.

(B) *Exemptions from General Declassification Schedule*.—Certain classified information or material may warrant some degree of protection for a period exceeding that provided in the General Declassification Schedule. An official authorized to originally classify information or material "Top Secret" may exempt from the General Declassification Schedule any level of classified information or material originated by him or under his supervision if it falls within one of the categories described below. In each case such official shall specify in writing on the material the exemption category being claimed and, unless impossible, a date or event for automatic declassification. The use of the exemption authority shall be kept to the absolute minimum consistent with national security requirements and shall be restricted to the following categories:

(1) Classified information or material furnished by foreign governments or international organizations and held by the United States on the understanding that it be kept in confidence.

(2) Classified information or material specifically covered by statute, or pertaining to cryptography, or disclosing intelligence sources or methods.

(3) Classified information or material disclosing a system, plan, installation, project or specific foreign relations matter the continuing protection of which is essential to the national security.

(4) Classified information or material the disclosure of which would place a person in immediate jeopardy.

(C) *Mandatory Review of Exempted Material*.—All classified information and material originated after the effective date of this order which is exempted under (B) above from the General Declassification Schedule shall be subject to a classification review by the originating Department at any time after the expiration of ten years from the date of origin provided:

(1) A Department or member of the public requests a review;

(2) The request describes the record with sufficient particularity to enable the Department to identify it; and

(3) The record can be obtained with only a reasonable amount of effort.

Information or material which no longer qualified for exemption under (B) above shall be declassified. Information or material continuing to qualify under (B) shall be so marked and, unless impossible, a date for automatic declassification shall be set.

(D) *Applicability of the General Declassification Schedule to Previously Classified Material*. Information or material classified before the effective date of this order and which is assigned to Group 4 under Executive Order No. 10501, as amended by Executive Order No. 10964, shall be subject to the General Declassification Schedule. All other information or material classified before the effective date of this order, whether or not assigned to Groups 1, 2, or 3 of Executive Order No. 10501, as amended, shall be excluded from the General Declassification Schedule. However, at any time after the expiration of ten years from the date of origin it shall be subject to a mandatory classification review and disposition under the same conditions and criteria that apply to classified information and material created after the effective date of this order as set forth in (B) and (C) above.

(E) *Declassification of Classified Information or Material After Thirty Years*. All classified information or material which is thirty years old or more, whether originating before or after the effective date of this order, shall be declassified under the following conditions:

(1) All information and material classified after the effective date of this order shall, whether or not declassification has been requested, become auto-

matically declassified at the end of thirty full calendar years after the date of its original classification except for such specifically identified information or material which the head of the originating Department personally determines in writing at that time to require continued protection because such continued protection is essential to the national security or disclosure would place a person in immediate jeopardy. In such case, the head of the Department shall also specify the period of continued classification.

(2) All information and material classified before the effective date of this order and more than thirty years old shall be systematically reviewed for declassification by the Archivist of the United States by the end of the thirtieth full calendar year following the year in which it was originated. In his review, the Archivist will separate and keep protected only such information or material as is specifically identified by the head of the Department in accordance with (E)(1) above. In such case, the head of the Department shall also specify the period of continued classification.

(F) *Departments Which Do Not Have Authority For Original Classification.* The provisions of this section relating to the declassification of national security information or material shall apply to Departments which, under the terms of this order, do not have current authority to originally classify information or material, but which formerly had such authority under previous Executive orders.

Section 6. Policy Directives on Access, Marking, Safekeeping, Accountability, Transmission, Disposition and Destruction of Classified Information and Material. The President acting through the National Security Council shall issue directives which shall be binding on all Departments to protect classified information from loss or compromise. Such directives shall conform to the following policies:

(A) No person shall be given access to classified information or material unless such person has been determined to be trustworthy and unless access to such information is necessary for the performance of his duties.

(B) All classified information and material shall be appropriately and conspicuously marked to put all persons on clear notice of its classified contents.

(C) Classified information and material shall be used, possessed, and stored only under conditions which will prevent access by unauthorized persons or dissemination to unauthorized persons.

(D) All classified information and material disseminated outside the executive branch under Executive Order No. 10865 or otherwise shall be properly protected.

(E) Appropriate accountability records for classified information shall be established and maintained and such information and material shall be protected adequately during all transmissions.

(F) Classified information and material no longer needed in current work ing files or for reference or record purposes shall be destroyed or disposed of in accordance with the records disposal provisions contained in Chapter 33 of Title 44 of the United States Code and other applicable statutes.

(G) Classified information or material shall be reviewed on a systematic basis for the purpose of accomplishing downgrading, declassification, transfer, retirement and destruction at the earliest practicable date.

Section 7. Implementation and Review Responsibilities. (A) The National Security Council shall monitor the implementation of this order. To assist the National Security Council, an Interagency Classification Review Committee shall be established, composed of representatives of the Departments of State, Defense and Justice, the Atomic Energy Commission, the Central Intelligence Agency and the National Security Council Staff and a Chairman designated by the President. Representatives of other Departments in the executive branch may be invited to meet with the Committee on matters of particular interest to those Departments. This Committee shall meet regularly and on a continuing basis shall review and take action to ensure compliance with this order, and in particular:

(1) The Committee shall oversee Department actions to ensure compliance with the provisions of this order and implementing directives issued by the President through the National Security Council.

(2) The Committee shall, subject to procedures to be established by it, receive, consider and take action on suggestions and complaints from persons within or without the government with respect to the administration of this

order, and in consultation with the affected Department or Departments assure that appropriate action is taken on such suggestions and complaints.

(3) Upon request of the Committee Chairman, any Department shall furnish to the Committee any particular information or material needed by the Committee in carrying out its functions.

(B) To promote the basic purposes of this order, the head of each Department originating or handling classified information or material shall:

(1) Prior to the effective date of this order submit to the Interagency Classification Review Committee for approval a copy of the regulations it proposes to adopt pursuant to this order.

(2) Designate a senior member of his staff who shall ensure effective compliance with and implementation of this order and shall also chair a Departmental committee which shall have authority to act on all suggestions and complaints with respect to the Department's administration of this order.

(3) Undertake an initial program to familiarize the employees of his Department with the provisions of this order. He shall also establish and maintain active training and orientation programs for employees concerned with classified information or material. Such programs shall include, as a minimum, the briefing of new employees and periodic reorientation during employment to impress upon each individual his responsibility for exercising vigilance and care in complying with the provisions of this order. Additionally, upon termination of employment or contemplated temporary separation for a sixty-day period or more, employees shall be debriefed and each reminded of the provisions of the Criminal Code and other applicable provisions of law relating to penalties for unauthorized disclosure.

(C) The Attorney General, upon request of the head of a Department, his duly designated representative, or the Chairman of the above described Committee, shall personally or through authorized representatives of the Department of Justice render an interpretation of this order with respect to any question arising in the course its administration.

Section 8. Material Governed by the Atomic Energy Act. Nothing in this order shall supersede any requirements made by or under the Atomic Energy Act of August 30, 1954, as amended. "Restricted data," and material designated as "Formerly Restricted Data," shall be handled, protected, classified, downgraded and declassified in conformity with the provisions of the Atomic Energy Act of 1954, as amended, and the regulations of the Atomic Energy Commission.

Section 9. Special Departmental Arrangements. The originating Department or other appropriate authority may impose, in conformity with the provisions of this order, special requirements with respect to access, distribution and protection of classified information and material, including those which presently relate to communications intelligence, intelligence sources and methods and cryptography.

Section 10. Exceptional Cases. In an exceptional case when a person or Department not authorized to classify information originates information which is believed to require classification, such person or Department shall protect that information in the manner prescribed by this order. Such persons or Department shall transmit the information forthwith, under appropriate safeguards, to the Department having primary interest in the subject matter with a request that a determination be made as to classification.

Section 11. Declassification of Presidential Papers. The Archivist of the United States shall have authority to review and declassify information and material which has been classified by a President, his White House Staff or special committee or commission appointed by him and which the Archivist has in his custody at any archival depository, including a Presidential Library. Such declassification shall only be undertaken in accord with: (i) the terms of the donor's deed of gift, (ii) consultations with the Departments having a primary subject-matter interest, and (iii) the provisions of Section 5.

Section 12. Historical Research and Access by Former Government Officials. The requirement in Section 6(A) that access to classified information or material be granted only as is necessary for the performance of one's duties shall not apply to persons outside the executive branch who are engaged in historical research projects or who have previously occupied policy-making positions to which they were appointed by the President; *Provided*, however, that in each case the head of the originating Department shall:

(i) Determine that access is clearly consistent with the interests of national security; and

(ii) Take appropriate steps to assure that classified information or material is not published or otherwise compromised.

Access granted a person by reason of his having previously occupied a policy-making position shall be limited to those papers which the former official originated, reviewed, signed or received while in public office.

Section 13. Administrative and Judicial Action.

(A) Any officer or employee of the United States who unnecessarily classifies or over-classifies information or material shall be notified that his actions are in violation of the terms of this order or of a directive of the President issued through the National Security Council. Repeated abuse of the classification process shall be grounds for an administrative reprimand. In any case where the Departmental committee or the Interagency Classification Review Committee finds that unnecessary classification or over-classification has occurred, it shall make a report to the head of the Department concerned in order that corrective steps may be taken.

(B) The head of each Department is directed to take prompt and stringent administrative action against any officer or employee of the United States, at any level of employment, determined to have been responsible for any release or disclosure of national security information or material in a manner not authorized by or under this order or a directive of the President issued through the National Security Council. Where a violation of criminal statutes may be involved, Departments will refer any such case promptly to the Department of Justice.

Section 14. Revocation of Executive Order No. 10501. Executive Order No. 10501 of November 5, 1953, as amended by Executive Orders No. 10816 of May 8, 1959, No. 10901 of January 11, 1961, No. 10964 of September 20, 1961, No. 10985 of January 15, 1962, No. 11097 of March 6, 1963 and by Section (a) of No. 11382 of November 28, 1967, are superseded as of the effective date of this order.

Section 15. Effective Date.—This order shall become effective on June 1, 1972.

RICHARD NIXON.

THE WHITE HOUSE,
March 8, 1972.

THE PRESIDENT

Presidential Documents

Title 3—The President

EXECUTIVE ORDER 11714

Amending Executive Order No. 11652 on Classification and Declassification of National Security Information and Material

By virtue of the authority vested in me by the Constitution and statutes of the United States, the second sentence of section 7(A) of Executive Order No. 11652 of March 8, 1972, is amended to read as follows:

"To assist the National Security Council, an Interagency Classification Review Committee shall be established, composed of a Chairman designated by the President, the Archivist of the United States, and representatives of the Departments of State, Defense and Justice, the Atomic Energy Commission, the Central Intelligence Agency and the National Security Council Staff."

RICHARD NIXON.

THE WHITE HOUSE,
April 24, 1973.

[FR Doc.73-8242 Filed 4-24-73;2:37 pm.]

Senator HRUSKA. I should like to interpolate at this point to this extent. There have been some analyses and criticisms of S. 1 and S. 1400 which have been uttered almost in a spirit of advocacy and political partisanship, charges that the Administration is doing certain

things as a further carry-on of certain of its attitudes towards the media and those who seek to investigate acts of the Government.

In my judgment, that attitude and that approach is not the best approach by any means, to put it mildly.

We have before us in S. 1 and in S. 1400, products based upon the report of the Brown Commission. This is a monumental task that has not been entered into to the point of implementation for a hundred years.

It is a bipartisan effort. It is an effort that has been made deliberately, studiously, under some of the finest staff that we could get, and the Commission that delivered and published its report was likewise bipartisan and it was assisted in its labors by some of the finest technical and professional staff that could be assembled for that purpose.

That's been said not once but a number of times. This is the best product we could get for codifying, revising and reforming the criminal law of this Nation.

We offer it not as a set conclusion, not as a final product, not as a fruit that must not be disturbed in any way.

Senator McClellan and I have repeatedly said in proposing these measures that we offer this as a vehicle. We offer this as a work product that we want to explore with all interested people, whether they be members of the Department of Justice or lawyers or judges or reporters or other representatives of the public. Upon the conclusion of the record in this case, we will then take all of these things into consideration and make our best judgment with eight men on the right hand of the chairman of the committee and seven men on this side, on the other political side.

I know of no better approach in accord with our democratic processes. To the extent that attitude and that atmosphere is violated and is breached by criticism which might be considered somewhat intemperate and somewhat on the partisan side, I do believe we have a departure that probably would be reconsidered by thoughtful legislators or critics.

It is in the most kindly and considerate way that I make those suggestions. That is particularly true of sections 1121 to 1126 of S. 1400, which by large, follow present current law.

There is no such thing as a "national secrecy act of 1973." If there is any national secrecy act at all, it would be a national secrecy act of 1948 and 1950, at which time we went into quite a plethora of statutory amendments dealing with divulging secrets to foreign agents and particularly to members or officers of the Communist Party.

So before we invent emotional labels of any kind, it would be well to give serious and thoughtful consideration to the history of these espionage laws and the mishandling of federal classified information.

In due time, we will address ourselves to those subjects, and I do hope in a scholarly, thoughtful, studious way, and try not to get ahead of ourselves or attempt to label things as political and partisan when in reality they are not.

I will now ask the Senator from Michigan, Senator Hart, if he has any preliminary remarks before we call on Mr. Maroney.

Senator HART. No, Mr. Chairman.

I apologize for being late and I am sure we will be, as always, thoughtful and scholarly and unpolitical.

Senator HRUSKA. That was said somewhat after the fact in my judgment, but we will let that pass for the time being.

The Senator from Kentucky is here. He is a very valuable member of the subcommittee.

Senator COOK. I do not have any remarks this morning, Mr. Chairman.

I hope we can develop the things you commented on. I would say I suspect the language of either S. 1 or S. 1400 will be altered in many respects before the final product of the committee is submitted to the Senate.

Senator HRUSKA. Very well.

Mr. Maroney, we welcome you here. You have filed a copy of your statement with the committee and you may proceed with it at this time.

Will you identify your colleagues.

STATEMENT OF KEVIN T. MARONEY, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, ACCOMPANIED BY ROBERT L. KEUCH, DEPUTY CHIEF OF THE APPELLATE SECTION, AND RONALD L. GAINER, DEPUTY CHIEF OF THE LEGISLATION AND SPECIAL PROJECTS SECTION

Mr. MARONEY. Yes. I am accompanied by Mr. Robert L. Keuch, Deputy Chief of the Appellate Section of the Criminal Division and Mr. Ronald L. Gainer, Deputy Chief of the Legislation and Special Projects Section of the Criminal Division.

Mr. Chairman and members of the subcommittee, I would like to convey at the outset the apologies of Assistant Attorney General Henry E. Petersen for his inability to testify before this subcommittee this morning. Mr. Petersen has been in overall charge of the development of the Department's proposal for a new Federal criminal code and has looked forward to the opportunity to explain to this subcommittee the rationale underlying the various provisions in the Department's proposal. Due to his unavoidable absence, however, he has asked me to discuss with you today this first series of particular offenses being reviewed by the subcommittee.

I am pleased to have the opportunity to present the position of the Department of Justice with respect to the provisions concerning offenses involving national security contained in Chapter 11 of S. 1400, the Administration's proposed Criminal Code Reform Act of 1973.

I have with me a memorandum setting forth those provisions, and relating them to existing law and to similar provisions proposed by the National Commission on Reform of Federal Criminal Laws and by the sponsors of S. 1. We would appreciate having this memorandum, which we will submit to the staff within the next few days, inserted in the record in these proceedings.

Senator HRUSKA. It is so ordered, and leave is granted.

[The memorandum is as follows:]

DEPARTMENT OF JUSTICE MEMORANDUM IN SECTIONS 1121-1126 OF THE
CRIMINAL CODE REFORM ACT

(Espionage and Related Offenses)

I. INTRODUCTION

This part of the chapter on national security offenses is concerned with those laws designed to deter the unauthorized disclosure of the Nation's military secrets—information concerning our national preparedness which would render us vulnerable to attack and defeat or powerless to achieve victory—and particularly to deter such disclosure to foreign powers. There are many provisions of current law directed toward this end. Enacted in response to different problems and at different times, they lack harmony of style, nomenclature, and policy.¹

II. CURRENT LAW

A. Summary

1. The most important provisions are 18 U.S.C. 793 and 794, which punish the collection of national defense information of any description and its transmission to foreign powers, whether friend or foe, in war or peace (793(a)-(c); 794(a), (b)), and, in addition, proscribe conduct which, while not itself espionage, could lead to compromise of national defense secrets (793(d), (e), and (f)). Sections 793 and 794 have not been modified substantially since their enactment as sections 1 and 2 of Title I of the Espionage Act of 1917. The maximum penalty for violation of 794 is death; that for 793 is ten years' imprisonment.

2. Other statutes are more restricted in application:

(a) 50 U.S.C. 783(b), (c), and (d); 18 U.S.C. 798; and 42 U.S.C. 2274, 2275, and 2277 protect only information which, in accordance with security procedures developed during World War II, has been "classified," i.e., affirmatively designated by the executive, in the interest of national security, for restricted dissemination.² 50 U.S.C. 783 covers any material which has been so classified; 42 U.S.C. 2274, 2275, and 2277 are concerned with atomic energy secrets; while 18 U.S.C. 798 is concerned with the products and methods of our espionage and counterespionage. Section 783 of Title 50 applies to communication by government employees or employees of government-controlled corporations to foreign agents or members of certain communist organizations, whereas the two other statutes generally apply to the communication of the specified classified information to any person not authorized to receive it. 50 U.S.C. 783 and 18 U.S.C. 798 are ten-year offenses; the Atomic Energy Act penalties, depending on the actor's intent, are imprisonment for life or ten years, under 2274 and 2275, or simply a fine under 2277.

(b) 18 U.S.C. 795-797 are misdemeanor provisions aimed at preventing the unauthorized obtaining of uncensored pictorial representations of military installations, particularly by aerial reconnaissance. Enacted in 1938, they were designed to supplement sections 793 and 794 of Title 18.

(c) 18 U.S.C. 799 provides one-year misdemeanor punishment for violations of NASA security regulations.

(d) 50 U.S.C. App. 3(c) and (d) are wartime provisions, dating from 1917, designed to insure effective censorship of communications with foreign countries. They carry ten-year penalties.

B. Discussion

1. *18 U.S.C. 793 and 794.*—The core provisions of the espionage laws are 18 U.S.C. 793 and 794. Section 793 contains six substantive subsections, (a) through (f), and a conspiracy subsection, (g); section 794 has two substantive provisions, (a) and (b), and a conspiracy subsection, (c).³

¹ See generally, National Commission on Reform of Federal Criminal Laws, Working Papers, pp. 450-461.

² With respect to the Atomic Energy Act, it is more accurate to say the Congress has declared broad categories of information as "Restricted Data" subject to declassification by the Commission. (42 U.S.C. 2014).

³ Sections 793(a)-(f) (1) and sections 794(a) and (b) were, with modifications to be discussed below, initially enacted as sections 1(a)-(e) and 2(a) and (b) of Title 1 of the Espionage Act of 1917; conspiracy was dealt with in section 4. Sections 1(a)-(e) and 2(a) of the Espionage Act were derived in turn from sections 1 and 2 of the Defense Secrets Act of 1911, the first statute to make espionage a peacetime offense and a violation of the civil code. Theretofore, espionage was exclusively a wartime offense, violative of the Articles of War and punishable only by court-martial or military commis-

Subsection 793(a) punishes penetration of various facilities related to national defense "for the purpose of obtaining information respecting the national defense" with "intent or reason to believe" that such information is to be used "to the injury of the United States, or to the advantage of any foreign nation." The list of protected facilities is now all-inclusive. In the Act of 1911 only places of direct military significance were enumerated. The expansion occurred in the Act of 1917, and only a few items are later additions.

The requirement that the offender act with a "purpose of obtaining information respecting the national defense" was brought forward from the Act of 1911, while the elements of intent or reason to believe that the information was to be used to the injury of the United States or another country's advantage were added by the Act of 1917. This was done to insure that only those acting with a criminal intent would be subject to the penalties which were then being raised from misdemeanor to felony class, since some clauses of Section 1 of the 1911 Act were susceptible to entirely innocent violation. See H. Rep. No. 30, 65th Cong., 1st Sess., p. 10, accompanying an earlier version of the 1917 Act, and 46 Cong. Rec. 2029-30 (1911).

In *Gorin v. United States*, 312 U.S. 19 (1941), the Court held that although intent to injure the United States and intent to secure an advantage to a foreign nation might often overlap, each was intended by Congress as an independent alternative, so that proof of intent to confer a benefit on a foreign country would support a conviction without proof of injury to the United States or intent to effect such injury.

The Court in *Gorin* approved the term "information relating to the national defense" as sufficiently precise, and described the phrase as "*** a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness." The Court stated that the relationship of the information to the national defense must be direct and rational, and must be determined by the jury from examination of the material and expert testimony as to its significance.

The Court in *Gorin* further stated that the Espionage Act was designed to protect only "secrets," and not matter made public by the defense establishment. A subsequent lower court decision, *United States v. Heine*, 151 F.2d 81 (C.A.2, 1945), *cert. denied*, 328 U.S. 833 (1946), added that there must have been an affirmative effort on the part of the government to prevent dissemination. In the absence of such restriction, the Court reasoned, collection of material from lawfully accessible sources and its communication within the United States could not be illegal, and a prohibition on transmission abroad in peacetime would be "to the last degree fatuous."

The penalty for violating any subsection of 793 is now ten years. The prototype offenses carried only a one-year penalty under the 1911 Act, which was doubled by the Act of 1917, and raised to the current level in 1940.

Subsection 793(b) prohibits the acquisition of objects relating to the national defense, with like purpose and like intent or reason to believe, by taking, copying, or other means. This provision was also derived from the 1911 Act, although that Act presupposed that the actor had committed a trespass forbidden by the prior clause. The Act of 1917 dissolved the bond, rendering each offense independent. *Gorin v. United States*, 312 U.S. 19 (1941).⁴

Subsection 793(c) covers receipt of material taken in violation of the "chapter." Like the preceding subsections it requires a "purpose of obtaining" defense information, but substitutes a knowledge that the material has been wrongfully obtained for the intent that the material be used to the injury of the United States or the advantage of a foreign nation. Subsection (c) also punishes agreeing to receive information, a carryover from the 1911 Act and probably an anachronism in view of the later-added conspiracy subsection, 793(g).

sion. Spring remains an offense under the Uniform Code of Military Justice, section 106 (10 U.S.C. 906); see *Ex parte Quirin*, 317 U.S. 1 (1942). A "savings clause," preserving military jurisdiction, appears in Chapter 1 of the proposed Criminal Code Reform Act. Cf. Espionage Act of 1917, Title 1, Section 7; *Ex parte Quirin*, *supra*, 317 U.S. at 27.

⁴All provisions of the 1911 Act were integrated, and all underwent the same surgery as subsection (a) and (b) underwent in 1917. Thus, what is now subsection (c) to some extent overlaps (b), but only because it was originally aimed at the recipient who had not perpetrated the forbidden trespass and taking, but received information from one who had. Subsection 2 of the Act of 1911, which became 2(a) of the 1917 Act and is now 794(a), which punishes communication to a foreign power, also required that the actor either have committed the forbidden trespass and taking, or have knowingly received the information from one who had, or have been guilty of a breach of trust in violation of section 1.

Subsections 793 (d) and (e) each prohibit "willful" communication of specified types of materials relating to the national defense or of information which the actor has reason to believe could be used to the injury of the United States or the advantage of a foreign nation, and the "willful" retention of both categories of material. The source provision in section 1 of the Defense Secrets Act covered only communication of the specified items in breach of a fiduciary duty by an official; the 1917 provision, section 1(d), added the prohibition against willful retention of such material in the face of a lawful demand and expanded the offense to cover persons in unlawful as well as lawful possession. In 1950, subsection 793(d) was split into subsections 793(d) and (e), the former covering those in lawful possession, and the latter those whose possession was unlawful. The requirement for a demand was retained in subsection 793(d) but was dispensed with under new subsection 793(e) since the government might not know to whom the demand should be directed and because, unlike the case of a person in rightful possession, a demand was unnecessary to render continued possession unauthorized. S. Rept. No. 2369, 81st Cong., 2d Sess., 89 (1950); *New York Times Co. v. United States*, 403 U.S. 713, 737-39 (1972) (concurring opinion of White, J.). The 1950 amendments also added a new category of protected information to the items previously enumerated in 18 U.S.C. 793(d), "information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation." The punctuation of the statute and the legislative history made it clear that the phrase "which information the possessor has reason to believe . . ." modified only the general term, "information," which was being added to the statute, so that in a prosecution concerning the enumerated items which had previously been covered by the statute, including documents, notes, and photographs, it remained necessary to prove only that these items related to the national defense and that the individual willfully communicated them to a person not entitled to receive them. S. Rept. No. 427, 80th Cong., 1st Sess., 7 (1949); H.R. Rep. No. 3112, 81st Cong., 2nd Sess., 52 (1950); *New York Times Co. v. United States*, 403 U.S. 713, 737-39; cf. *Coplon v. United States*, 88 F. Supp. 910 (S.D.N.Y. 1949).

The present wording of 18 U.S.C. 793(d) and (e) making guilty one who "communicates, delivers, or transmits" originated with the Espionage Act of 1917, 40 Stat. 217 on June 15, 1917, and has survived without intervening changes. The term "communicates" was intended as a broad concept applicable to any manner of communication of the type of information that Congress had determined should not be revealed.⁵

Unlike subsections 793(a) and (b), subsections (c) through (f) do not require an intent to injure or give an advantage, but only an awareness of the significance of the information. They are principally prophylactic measures, aimed at deterring conduct which might expose material to foreign eyes rather than active espionage on behalf of foreigners.

Subsection (f) (1) punishes loss of defense information resulting from "gross negligence." Subsection (f) (2), which was added in 1948, punishes the failure to report a loss.

⁵ The term includes the general dissemination of such information through publication. In the House debates on the Espionage Act it was observed that "communication" is a far broader concept than "publication," see Cong. Rec. 1716 (1917), and in the Senate debates it was emphasized that the Act would properly punish an editor "if he did publish information as to movements of the fleet, the troops, the aircraft, the location of powder factories, the location of defense works, and that sort of thing," 55 Cong. Rec. 2009 (1917). A provision granting a Presidential power of prior restraint on such publication was deleted from the 1917 Act prior to its passage. See 55 Cong. Rec. 1763, 1808 (1917). As observed by Mr. Justice White in *United States v. New York Times*, 403 U.S. 713 at 733-734 (1971):

When the Espionage Act was under consideration in 1917, Congress eliminated from the bill a provision that would have given the President broad powers in time of war to proscribe, under threat of criminal penalty, the publication of various categories of information related to the national defense. However, these same members of Congress appeared to have little doubt that newspapers would be subject to criminal prosecution if they insisted on publishing information of the type Congress had itself determined should not be revealed.

(Although the district court in that case had ruled that the language of the Act did not include "publication," a view that was shared by Justices Douglas and Black, *id.* at 713, 720-722, this view was rejected not only by Justice White, but also by Justices Stewart and Blackmun and by Chief Justice Burger, *id.* at 730-734, 752, 759, and was questioned by Justice Marshall, *id.* at 745.) The intent of the Congress also appears from the inclusion in the same Act of a provision, now appearing as 18 U.S.C. 1717, declaring as nonmailable "every . . . newspaper, pamphlet, book, or other publication . . . in violation of sections . . . 793 [or] 794,"

Conspiracy to violate section 793, perfected by an overt act, was added as an offense in 1950 by subsection (g), and was made punishable equally with the completed offense. Therefore the penalty would have been the five year maximum provided by 18 U.S.C. 371. In addition, subsections (b), (c), (d) and (e) of section 793 explicitly include attempts to perpetrate the forbidden acts as offenses of equal gravity.

Subsection 794(a) prohibits communication of national defense information to a foreign nation with intent or reason to believe that it will be used to the injury of the United States or the advantage of a foreign power. The penalty now provided is death, life imprisonment, or any lesser term of years. No fine is provided. It is derived through section 2(a) of the 1917 Act from section 2 of the Act of 1911, which carried a ten-year penalty. The act of 1917 added the element of hostile intent, mentioned above, and increased the penalty to 20 years, with the further provision that the death penalty or a maximum of 30 years could be imposed if the offense were committed in time of war. The last raising of the penalty in 1954 was a reaction to the threat of nuclear catastrophe.

Subsection (b) of section 794 was introduced by section 2(b) of the Act of 1917, and provided the death penalty for any espionage activity on behalf of a wartime enemy. Apparently it was believed that an intent to convey useful military information to the enemy implied a desire to injure the United States and assist the enemy, thus rendering unnecessary explicit statement of the formula employed in sections 2(a) and 1(a) and (b). This section does not reflect the grading distinction between collecting and transmitting information that had been employed in sections 1 and 2 of the 1911 Act and carried forward in sections 1 and 2(a) of the Act of 1917, but treats all facets of espionage activity with equal severity.

The section is concerned with "any information which might be useful to the enemy." It particularly specifies troop and ship movements, reflecting concern about the need to protect from attack the ships carrying our troops to European battlefields. See 54 Cong. Rec. 3605. The section provides that an individual is guilty of the offense if he "collects, records, publishes, or communicates," the information.

Subsection (c) of section 794 carries forward section 4 of Title 1 of the Espionage Act, providing that conspiracy to violate subsections (a) or (b) is to be punished as severely as the completed offense. Inasmuch as espionage is generally carried on by rings, persons who have collected information in violation of section 793 would sometimes be subject under section 794(c) to the higher penalty fixed for communicators in section 794(a).

2. *18 U.S.C. 795-797.*—These provisions were enacted in 1938. The Sino-Japanese War had been on for several years, but certain incidents such as the attack on the Panay threatened the United States with immediate involvement. The airplane had become a commonplace, the tourist and his camera were everywhere, and journalists and photographers were scouring the Pacific theater to satisfy public curiosity aroused by the war. Concern that there were also spies in the area, or that innocently obtained and published sketches or photos could be used by Japanese intelligence, led to the War and Navy Departments' request for this legislation. The misdemeanor penalty was related to the absence of the hostile intent required by sections 793(a) and (b) and section 794(a), which these sections were explicitly intended to supplement. H.R. Rep. No. 1650, 75th Cong., 2d Sess. (1937): 83 Cong. Rec. 70-71 (1938).

These sections are noteworthy in that they involve peacetime censorship. The assignment of authority to the President to designate restricted areas followed the usage of Espionage Act, title I, sections 1 and 6.

3. *42 U.S.C. 2274, 2275, and 2277.*—On August 1, 1946, almost one year to the day after the bombing of Hiroshima which ushered in the Atomic Age and manifested the awesome power of nuclear weapons, the Atomic Energy Act became law. The Act attempts to balance the need for dissemination of information necessary for the development of peaceful uses of atomic energy and weapons development, against the necessity of preventing dissemination of weapons information to foreign powers. To effect this latter objective the Act defines a category of information, "Restricted Data," in section 2014 of Title 42 and prohibits its unauthorized communication or receipt in sections 2274 and 2275, respectively, and also in section 2277.

Section 2274(a) provides a maximum sentence of life imprisonment if the communication is with "intent to injure the United States" or "secure advan-

tage to a foreign nation." ⁶ Subsection (b) provides a 10 year penalty if the communication is without such specific intent but with "reason to believe" that the information "will be utilized" to the injury of the United States or the advantage of a foreign nation.

Section 2277 provides a \$2,500 fine for the knowing communication of Restricted Data, without such intent or belief, to any unauthorized person by a present or former member or employee of the Commission, the Armed Forces, or any government agency or contractor or licensee. It also covers conspiracy to commit an unauthorized communication or receipt.

Section 2274, 2277 and 2275 can be violated by attempts and conspiracies as well as by the completed act of communicating or receiving. Unlike 18 U.S.C. 793(g) and 794(c), there is no requirement for conviction of conspiracy that an overt act be perpetrated. *Rosenberg v. United States*, 364 U.S. 273, 304 n.2 (Frankfurter, J. dissenting).⁷

4. 18 U.S.C. 798.—Sometime during the 1930's, according to the proponents of this legislation, the United States succeeded in breaking the Japanese naval code. This enabled the United States to monitor the secret communications of Japan clandestinely until a retired government official disclosed our success in his memoirs. The Japanese then developed a more difficult code which we could not crack until 1942, too late to prevent the disaster at Pearl Harbor, but just in time to yield a decisive victory at Midway. These episodes manifested the importance of concealing penetration of foreign communication systems, and, conversely, the need to protect the security of United States communications systems from exposure in peacetime. S. Rep. No. 111, 81st Cong., 2d Sess. (1950); H.R. Rep. No. 1895, 81st Cong., 2nd Sess. (1950).

The section prohibits the knowing and willful communication, furnishing, transmitting, or otherwise making available to any unauthorized person any classified information concerning communications intelligence and communications intelligence methods. The statute seeks to protect a type of classified information, and in a prosecution under the statute the government's evidentiary burden is to establish that the information communicated was classified information of the specified type. The government is not required to demonstrate, as is necessary under other espionage statutes, that the information in fact related to the national defense. Prosecution under 18 U.S.C. 798 is, therefore, possible without disclosure of the sensitive information the section seeks to protect. Cf. *Scarbeck v. United States*, 317 F. 2d 546 (C.A.D.C., 1962), cert. denied, 374 U.S. 856 (1963).

⁶ The original enactment of what is now section 2274(a) contained a further refinement: if the offense was committed with intent to injure the United States, as distinguished from merely an intent to secure an advantage to a foreign power, the punishment could, if the jury so recommended, be death or life imprisonment; otherwise the penalty would be 20 years. In 1954 the more favorable treatment for simply giving an advantage to a foreign nation was abolished, and the higher penalty, subject to jury recommendation, was made applicable. In 1969, after the Supreme Court decision in *United States v. Jackson*, 390 U.S. 570 (1958), had announced the unconstitutionality of predicated the death penalty upon jury recommendation, the death penalty and the provisions for jury recommendation for life imprisonment were both dropped. Section 2275, which covers receipts, underwent the same changes as section 2274(a).

⁷ Although the phraseology of the Espionage Act was employed as building blocks in these provisions, the rearrangements created a different statute. A few examples will suffice:

(1) In 1946 the death sentence could be imposed under the Espionage Act only for wartime offenses, section 794(b), while the existence of war was irrelevant under the Atomic Energy Act, sections 2274(a) and 2275.

(2) In those cases when the death penalty could be imposed under the Espionage Act, it was at discretion of the trial judge, whereas the Atomic Energy Act required a jury recommendation.

(3) In 1954 when the death penalty could be imposed for peacetime offenses under either act, the Atomic Energy Act retained the requirement for a jury recommendation.

(4) Today, the death penalty is authorized under 18 U.S.C. 794 but not under 42 U.S.C. 2274 or 2275.

(5) Today, the minimum *mens rea* under 42 U.S.C. 2274(b), a 10 year offense, is that the communicator have reason to believe that the information "will be used" to the injury of the United States or the advantage of a foreign nation, whereas under 18 U.S.C. 793(d) or (e) it is sufficient if he knows that the information "could be" so used. Thus one who deliberately discloses information about a conventional weapon, such as a machine gun, recognizing that it "could be used" by a foreign nation but with no reason to believe that it will be so used, violates 18 U.S.C. 793(d) and is subject to 10 years imprisonment, while he could similarly disclose atomic weapon secrets without violating 42 U.S.C. 2274(b). While it has been suggested that section 2274(b) requires a higher intent to prevent the prosecution of innocent minded scientists engaged in the interchange of sensitive material, *Rosenberg v. United States*, 346 U.S. 317-18 (1953) (Douglas, J., granting stay of execution), it is not apparent why section 793(d) should be less solicitous of scientists working on more conventional weapons.

Somewhat opaquely, section 798 also provides punishment for anyone who "uses *** [such information] in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States." Perhaps this would apply to an official who threatened to expose secret information in order to blackmail the government into giving him a promotion, paying his unwarranted expense accounts, or forgiving his misconduct. The language differs from, but parallels the phrase "injury to the United States" and "advantage to any foreign nation" of section 793. However, the additional requirement that benefit to a foreign government must be accompanied by "detriment to the United States" creates a tautology. The approach seems both to have missed the point of, and denied the government the advantage of, the decisions in *Gorin* and *Heine*, which held that advantage could be conferred upon a foreign nation and could be punished regardless of whether injury to the United States was intended or sustained.

In 1945, when this legislation was initially proposed, Congress had scheduled investigation of the Pearl Harbor disaster in which the exchange of coded communications between the several departments of the government and the military and naval forces played a part. Concern that this statute would permit the executive to block such investigation led to the enactment of subsection (c), which provides that the section does not apply to supplying a committee of the House or Senate or a joint committee thereof with information it has requested. 91 Cong. Rec. 10047-50 (1945).

5. 50 U.S.C. 783(a)-(d)—50 U.S.C. 783 is part of the Internal Security Act of 1950, a complex series of provisions designed to deal with the problem described by the Congress in section 781 as the existence of a world-wide communist conspiracy, employing espionage, infiltration, and subversion to achieve its ends.

Section 783(a) prohibits conspiracy to perform any act which would substantially contribute to the establishment of a totalitarian dictatorship in the United States, the control of which would be in the hands of foreigners.

Section 783(b) prohibits any federal employee or any employee of certain corporations from knowingly communicating any classified material to either a foreign agent or a member of specified Communist organizations without prior authorization. Subsection (c) is the converse provision, prohibiting foreign agents or members of such organizations from receiving classified material from any federal officer without having obtained prior permission. Subsection (d) provides a ten-year penalty for any violation of the section. Attempts to violate subsection (b) or subsection (c) are explicitly dealt with in the subsections themselves.

The conduct punished by section 783(b) would seem to be more or less covered by section 793(d), if not section 794(a), of Title 18, as would 50 U.S.C. 783(c) by 18 U.S.C. 793(c). The principal distinction is that the actual relevance of the information to the national defense need not be proved to the jury in a section 783 case as it would have to be under section 793 or section 794. Compare *Scarbeck v. United States*, 317 F. 2d 546 (C.A.D.C., 1962), cert. denied, 374 U.S. 856 (1963), with *Gorin v. United States*, 312 U.S. 19 (1941). This obviates the need of the government to disclose at trial the very information it seeks to protect. A distinction of lesser importance is that 18 U.S.C. 793 and 794 deal with information relating to the "national defense" while 783 speaks of material which has been restricted in the interest of "national security," a somewhat broader concept.

III. PROPOSALS OF THE NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAWS, FINAL REPORT SECTIONS 1112-1117

A. Section 1112

Section 1112 of the Final Report of the Commission would substantially reenact section 794 and those parts of section 793 which involve deliberate espionage activity, subsections (a)-(c).

The capital offense of dealing with a wartime enemy, subsection 794(b), would be a Class A felony under subsection 1112(1) (b).

The capital offense of communicating national defense information to a foreign power, subsection 794(a), would be covered in subsection 1112(1) (a), and would be a Class A felony only if (1) it occurs in wartime, or (2) it involves special classes of information; otherwise it would be a Class B felony.

The trespassory, copying, and receiving activities now described in subsections 793(a)-(c) would be treated as attempts to communicate by subsection 1112(3), punishable on a par with the completed offense.

The separating out of the offenses defined in subsections 793(d)-(f) permits characterization of the principal offenses defined in section 1112 as "espionage." In current law and prior acts the word was used only as a caption, never in the text.

Subsection 1112(2) would reintroduce the 1917 Act grading distinction between wartime and peacetime communication with a foreign power; it would also make the specific class of material a grading factor, which is an innovation.

The class of protected information would be generally described as "national security information," which is broader than "national defense information." The term "national security" has not been interpreted by the courts as has the term "national defense" in the *Gorin* case, but its use is in accord with more recent Executive Orders and statutes. Inclusion of "restricted data" of the Atomic Energy Act in subsection 1112(4) (a) (iv) would amalgamate the provisions of 42 U.S.C. 2274(a) and (b) and 2275 with current 18 U.S.C. 793 and 794 and would absorb them into sections 1112 and 1113.

Espionage on behalf of domestic insurgents, which is probably not covered by current law, would be made an offense by the dubious method of defining "foreign power" to include domestic insurgents, subsection 1112(4)(c). The Commission does not, however, follow through and treat the existence of a rebellion as the equivalent of international war for purposes of subsections 1112(1)(a) and (2).

By treating the section 793(a)-(c) offenses as attempts, punishable as severely as the completed offenses (section 1112(3)), the Commission would end the penalty distinction between collecting and communicating information which dates back to sections 1 and 2 of the 1911 Act. The distinction has made little or no sense since the introduction in 1917 of a high degree of *mens rea* into the section 793(a) and (b) offenses.

The device of calling 18 U.S.C. 793(a) conduct an "attempt" would avoid the need for the long list of prohibited facilities, but "restricted area" is nowhere defined. A more significant fault is that neither entering a fort to secure information, section 793(a), nor stealing a document while there, section 793(b), is "attempted espionage;" traditionally it is espionage. The section 1112(1)(b) offense, like 18 U.S.C. 794(b), would make it clear that activity antecedent to communication, if done with like intent, is equally espionage, but as section 1112(1)(a), 1112(1)(b), and 1112(3) now stand, such conduct which is "espionage" in wartime would be only "attempted espionage" in peacetime, and *vice versa*.

The *mens rea* standard of 18 U.S.C. 793(a) and (b) and 794(a) would be considerably modified in section 1112(1)(a): (1) "reason to believe" would be dropped as an alternative to "intent;" (2) "prejudicial to the safety or interest of the United States" would be substituted for "injury to the United States;" (3) advantage to a foreign nation" would be dropped as an alternative to "injury to the United States."

The substitution of "prejudice" etc., for "injury" is in accord with the more modern statutory usage, e.g., 18 U.S.C. 798, and is somewhat less metaphorical, but it lacks the judicial acceptance accorded the language of 18 U.S.C. 793. The Commission's explanation for the proposed dropping of "reason to believe"—that it is merely indicative of the type of evidence which should be considered as bearing on intent, and that no case has been found in which intent was not accompanied by reason to believe—is not very persuasive. "Reason to believe" seems to be somewhat more concrete.

The reason for the proposed dropping of "advantage to a foreign nation," other than its characterization as "surplusage," is not explained. In view of the distinction between the two as explained in the *Gorin* and *Heine* cases, and the greater ease with which "advantage" can be proven, the elimination seems unwise.

The section 1112(1)(a), the Commission would substitute "reveals" for the straightforward word "communicates" employed by sections 793 and 794. The Working Papers go to great lengths to explain the use of this term, the gist being a desire to adopt about ninety percent of the ruling in *Heine* (that material in the public domain is not protected by the Espionage Act), while rejecting the ten percent that holds that a spy may transmit his collation and anal-

ysis of legitimately obtained information without incurring criminal penalties. *Working Papers*, Vol. I, p. 452, n.9.

B. Section 1113

Section 1113 would embrace the offenses of 18 U.S.C. 793(d)-(f), conduct which might lead to a compromise of security. They would be graded at the Commission's Class C (7 year) level, below the current ten-year maximum, and reduced relative to the offenses defined in 18 U.S.C. 793(a)-(c) with which they have been on a par since 1911. The section would not follow through on the wartime-peacetime or class-of-information grading distinctions made in section 1112.

Section 1113(a) would cover the communication aspects of subsections (d) and (e) of 793; subsection (b) would cover the failure to safeguard or report loss provisions of subsections 793(f) (1) and (2); and subsection (c) would cover the failure to deliver up material on demand which is in subsections 793(d) and (e). Section 1113(c) would require a demand, whether or not possession is authorized.

C. Section 1114

Section 1114 would carry over almost verbatim 18 U.S.C. 798. The Working Papers had contemplated that its subject matter would be covered in sections 1112 and 1113 through the inclusion of this material in the definition of "national security information." The Commission's comment does not explain why it did not follow the suggestion. It is suspected that the reasoning was the same as partially motivated enactment of 18 U.S.C. 798 in the first place: that the hypersensitivity of classified communications material calls for a far lower standard of culpability than is required by sections 1112 or 1113.

In its Comments, the Commission states that it would drop the phrase "advantage of any foreign nation" from section 1114(1)(c) as an alternative to "prejudicial to the safety or interest of the United States" as "surplusage." The observation is accurate with respect to 18 U.S.C. 798, where it is coupled with "detriment to the United States," but it need not be so as shown by current usage in 18 U.S.C. 793 and 794(a) (see discussion of sections 793 and 794, *supra*).

D. Sections 1115 and 1116

In section 1115 the Commission would reenact 50 U.S.C. 783(b), which covers the transmission by a government official of classified information to either a foreign agent or a member of a Communist organization. The Commission would also cover transmissions by former government officials. The Comment expresses approval of, and intention to retain, the construction given 50 U.S.C. 783 in the *Scarbeck* case, namely, that a government official cannot challenge the validity of the classification, at least when he had been dealing with the limited class of recipients named in the statute who have absolutely no right to the material.

Section 1116(a) would essentially reenact 783(c) of Title 50. Subsection (b) would punish soliciting one to commit a crime defined in sections 1112, 1113, 1114, or 1115. The peculiarities of 1115 might require a specific receiving statute such as section 1116, but this points up the absence of an appropriate receiving statute, equivalent to 18 U.S.C. 793(c), covering sections 1112, 1113, and 1114. Section 1116(b) would not perform this function, for although illegal recipients may often solicit information from a communicator, that may not be the case.

E. Section 1117

Section 1117 purports to reenact two provisions of the Trading with the Enemy Act, 50 U.S.C. App. 3(c), (d). The first of these is permanent legislation which provides that immediately upon a declaration of war no communication may be sent to any foreign country except by way of regular mail. This automatically sets the stage for censorship in the event that it is ordered. The second subsection was temporary legislation which provided that if, in the course of the then-current war (i.e., World War I), the President decided to set up censorship, it would be an offense to evade it in any one of several ways. It is questionable whether the first provision makes sense today. The second need not be enacted now. If, during a war or emergency, Congress sees fit to establish a censorship system or to allow the President to do so, it can provide the penalties at that time.

IV. S. 1 PROPOSALS: SECTIONS 2-5B7-2-5B9

A. §2-5B7 (*Espionage*)

This section combines the true espionage provisions of current law, 18 U.S.C. 793(a)-(c) and 794(a) and (b). It contains a special reference to attempts patterned after Final Report section 1112(3), which seems unnecessary since the description of the offense in S.1 differs from that in Final Report section 1112(1) (a). Wartime espionage and espionage affecting a particularly sensitive class of material would be a Class A felony, while any other espionage would be a Class B felony. This section, through application of the general definition of "agent," makes it a serious offense to impart information to any alien even if such alien in fact is not acting on behalf of a foreign power.

B. §2-5B8 (*Misuse of National Defense Information*)

This section attempts to amalgamate 18 U.S.C. 793(d), (e), and (f), 18 U.S.C. 798, and 50 U.S.C. 783(b) in one section. Since no reference is made to "classified" information, the rule of *United States v. Scarbeck, supra*, now applicable in prosecutions under 18 U.S.C. 798 and 50 U.S.C. 783, would no longer apply. The section appears to require, with respect to the several violations enumerated, proof that the United States has in fact been harmed—in a manner harmful to the safety. * * * Most of the offenses brought forward from current law require only an awareness that the information "could be used" to the injury of the United States; indeed, even the true espionage sections require only an intent or reason to believe that the United States will be injured or a foreign nation benefited, and not proof of actual injury. See *Gorin v. United States, supra*. Subsection (3) requires a demand from a person in unauthorized possession, contrary to 18 U.S.C. 793(e), and does not explicitly mention the section 793(d) obligation of persons in authorized possession faced with a lawful turnover demand. Subsection (6), punishing communication of national defense information to foreign agents and members of Communist organizations, seems redundant in the light of subdivision (1), which prohibits communication to any unauthorized person.

C. §2-5B9 (*Violation of Wartime Censorship*)

This section, designed to bring forward 50 U.S.C. App. 3(c) and (d), is patterned after Final Report section 1117, and, as noted in connection therewith, appears to be superfluous.

V. DEPARTMENT OF JUSTICE PROPOSALS: SECTIONS 1121-1126

A. *Summary*

Following the Commission's lead, those offenses, now in 18 U.S.C. 793(a)-(c), which cover true espionage activity, have been combined with those of 18 U.S.C. 794 for treatment in section 1121. The 18 U.S.C. 793(d)-(f) offenses involving conduct which could lead to compromise of military secrets have been placed in sections 1122 and 1123: actual disclosure, now in 18 U.S.C. 793(d) and (e), becomes section 1122, while suffering a loss through gross negligence or failing to report it, now in 18 U.S.C. 793(f) (1) and (f) (2), and refusal to turn over, now in 18 U.S.C. 793(d) and (e), have been placed in section 1123.

The penalties for violation of 18 U.S.C. 793(a)-(c) have been increased, but otherwise there has been a general amelioration of penalties and more flexibility in grading them according to the relative seriousness of the offense.

50 U.S.C. 783(b) and (c), 18 U.S.C. 798, and 42 U.S.C. 2277 have been covered in sections 1124 and 1125. The remaining Atomic Energy Act provisions, 42 U.S.C. 2274 and 2275, have also been assimilated into sections 1121 through 1125 through the definitions found in section 1126.

18 U.S.C. 795-797 and 799, all misdemeanors, are transferred to Titles 42 and 50.

50 U.S.C. App. 3(c) and (d) need not be reenacted for the reasons stated in the comment on Final Report section 1117.

B. *Section 1121 (Espionage)*

This section covers three types of espionage activities: (1) entering a restricted area for the purpose of spying for a foreign power; (2) collecting information for a foreign power; and (3) communicating information to a foreign power. As is true under present law, the subject of the criminal activity

must be "information relating to the national defense." This phrase is used to perpetuate the Supreme Court's definition in *Gorin v. United States*, *supra*, 312 U.S. at 28 ("a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness") and other judicial constructions of the phrase, and to retain the issue of whether or not material relates to the national defense as a jury question which is decided on the basis of examination of the material and the testimony of witnesses explaining its significance. Most important, the phrase is carefully used to insure that the defenses that were available under prior case law are integrated into the proposed code, such defenses providing that an individual cannot be convicted of mishandling information relating to the national defense if the information was made available to the public; if the government did not attempt to restrict its dissemination; or if the information was available to anyone from lawfully accessible sources, see *United States v. Heine*, 151 F. 2d 813 (C.A. 2, 1945), *cert. denied*, 328 U.S. 833 (1946). An effort is made to render the definition somewhat more concrete in section 1126 by spelling out some examples of the type of information intended to be included.

In section 1121, current law's "with * * * reason to believe" has been recast as "with knowledge" to conform more closely to the Code's general culpability standards. It has been retained as an equal alternative to "intent" because the Commission's reasons for eliminating it are unpersuasive. Retention appears particularly warranted in light of the maxim that the law holds one to intend the natural and probable consequences of his acts.

The more modern and less metaphorical "prejudice to the safety or interest of the United States"⁸ has been used rather than "injury to the United States." The alternative of "giving advantage to a foreign power," recognized in *Gorin v. United States*, *supra*, has been retained. The desire to confer an advantage is objectively demonstrable, and it should not be necessary to have to establish the defendant's subjective state of mind, or disprove allegations that he thought he was doing the best thing for this country. See *Gorin v. United States*, 111 F. 2d 712, 713 (C.A. 9, 1940).

Violation of 1121 is a class A felony if committed in time of war or during a "national defense emergency" declared by the President or Congress,⁹ or if it involves a limited class of information, disclosure of which even in peacetime would render the United States vulnerable to massive attack by destroying its means of detecting and repelling such attack or deterring attack through threat of retaliation. Peacetime espionage which does not involve this special class of information has been reduced from its current capital status to a Class B felony.

The distinction in grading between collectors for foreign nations and communicators to foreign nations has been eliminated. The distinction, which originated in the Act of 1911, lost its rational basis when the same higher degree of *mens rea* was introduced into both offenses by the 1917 Act. Moreover, in practice, the higher penalty of the communicator could in any event be invoked against the collector through the conspiracy provision in 18 U.S.C. 794(c).

C. Section 1122 (Disclosing National Defense Information)

This section penalizes knowing communication of information relating to the national defense to a person not authorized to receive it. The person to whom the information is communicated may also be subject to prosecution, as under current law, as an accomplice or a conspirator. Reason to believe that communication would injure the United States or assist a foreign nation is not required, just as it is not generally required by the current statute, although a somewhat similar mental element will be required to be established by virtue of the fact that knowledge will, pursuant to section 302, have to be proved as to the character of the information and as to the recipient's lack of authorization.

Culpable disclosure of national defense information, now a 10 year offense under section 793(d) and (e), is made a 15 year offense under section 1122 if committed in time of war or national defense emergency; otherwise it is a 7 year offense. Since the offense is less "intentional" than a violation of section 1121, it was not believed that the deterrent effect would be increased by

⁸ A similar formulation is currently used in 18 U.S.C. 798.

⁹ A "national defense emergency," a limited type of national emergency, is defined in section 111.

enhancing the penalty for peacetime disclosure of the special class of information referred to in section 1121(b)(1)(B).

D. Section 1123 (Mishandling National Defense Information)

This section is directed at the mishandling of information relating to the national defense by persons in authorized possession or control of such information, as well as by persons whose possession or control is unauthorized.

Subsection (a)(1) applies whether or not the person's possession or control is authorized, and prohibits recklessly permitting the loss, destruction, theft, or communication to unauthorized persons of the subject information. This section brings forward 18 U.S.C. 793(f)(1), extending its coverage to persons whose possession was not authorized.

Subsection (a)(2), which applies only to persons in authorized possession or control of national defense information, proscribes three kinds of activity which might jeopardize such information: (1) retention or failure to surrender it on demand to a federal public servant authorized to receive it, deriving from 18 U.S.C. 793(d); (2) knowing failure to report promptly its loss, destruction, theft, or communication to a person not authorized to receive it, bringing forward 18 U.S.C. 793(f)(2); and (3) reckless violation of a duty imposed for the safeguarding of the information, a provision without a direct counterpart in current law.

Subsection (a)(3) applies only to persons whose possession or control is not authorized; they are penalized if they knowingly fail to deliver the information to a federal public servant entitled to receive it, whether or not a demand has been made. This reenacts part of 18 U.S.C. 793(e).

Except for failure to obey security regulations, which carries a three year penalty, these offenses are punishable by imprisonment for several years, a reduction from the current penalty level of ten years.

E. Section 1124 (Disclosing Classified Information)

This section makes it an offense for a person who is or has been in authorized possession of classified information, or who has obtained such information as a result of his status as a federal public servant, knowingly to communicate such information to a person not authorized to receive it. In a deviation from the current statutes from which it is derived¹⁰ the section applies *only* to persons who communicate the information; it is explicitly stated in subsection (b) that recipients of the information are not subject to prosecution either as accomplices or as conspirators.

"Classified information" is defined in section 1126 in substantially the same terms as those employed in 18 U.S.C. 798 and 50 U.S.C. 783. As under the comparable provisions of current law, it is not necessary to show that the information relates to the national defense, as it would be in a prosecution under section 1121, 1122, or 1123. The purpose, of course, is to assure the availability of one statute, carrying a lesser penalty, which obviates any necessity of disclosing at trial the very information which is sought to be protected.

Section 1124(d) explicitly provides that improper classification is not a defense to prosecution, codifying the rule of *Scarbeck v. United States*, *supra*.¹¹ The rationale is to prevent any circumvention of the purpose of the statute through the public disclosure of the subject information which would inevitably attend litigation of the propriety of the classification. Moreover, since the statute applies only to persons in positions of trust who are aware of their special responsibilities toward classified information and who nevertheless disclose such information to persons they know are not authorized to receive it, there is less reason than there might otherwise be for declining to permit them to justify their breach on the ground that the information was improperly classified.¹²

¹⁰ 18 U.S.C. 798; 42 U.S.C. 2274, 2277; 50 U.S.C. 739(b). The consolidation of these sections into section 1124 results in a more restricted coverage than some of the current statutes in that only a person who lawfully possessed the information may be prosecuted; it results in a less restricted coverage than some in that all classified information is included and in that communication to any unauthorized recipient is included. See pp. 17-21, *supra*.

¹¹ The government must still establish, of course, that the information was in fact classified and was classified by a person with authority to do so.

¹² Under the provisions of Executive Order Number 11652, issued in March of 1972, such persons for the first time are afforded a specific procedure to challenge classifications they believe to be erroneous, and to obtain review of their claims by an inter-agency committee.

To ensure that the statute will not hinder the legitimate workings of Congress, subsection (c) provides a defense where the information is communicated only to a regularly constituted committee of the Senate or House of Representatives, or to a joint committee thereof, pursuant to lawful demand. This is derived from 18 U.S.C. 798(c). The subsection makes it clear that section 1124 is not a bar to disclosure under the specified circumstances; it does not permit unauthorized disclosure of national defense information, any more than does current law. Cf. 18 U.S.C. 793(d) and (e).

F. Section 1125 (Unlawfully Obtaining Classified Information)

This section, covering receipt of classified information, is a partial counterpart of section 1124. Section 1125 applies only to agents of foreign powers, however, and does not reach other persons to whom classified information is communicated in violation of section 1124.

As is true under section 1124, improper classification of the information is not a defense under section 1125.

The ten-year penalty under present law has been reduced to seven years to parallel section 1124's treatment of persons who disclose classified information to agents of foreign powers.

G. Section 1126 (Definitions)

This section contains definitions of certain terms used in sections 1121 through 1125. Definitions of other terms used in these sections and elsewhere in the Code (e.g., "foreign power") may be found in section 111 (General Definitions). The terms "authorized" and "classified information" are drawn from 18 U.S.C. 798, 50 U.S.C. 783, and 42 U.S.C. 2014. On the assumption that current kinds of legislative and executive procedures for insuring confidentiality will continue to be employed, reference is made to restrictions imposed by "statute," as is now the case with atomic energy secrets, 42 U.S.C. 2014, and by "executive order," as is the case with material now classified under E. O. 11652 or its predecessor, E. O. 10501, both of which delegate classifying authority and fix standards for its exercise. As the generalities of statutes and executive orders frequently require implementing regulations on the part of the responsible agencies, reference to such rules has been included.

"Communicate" has been selected as the most generic term, and is intended to include all the possible synonyms (e.g., give, send, transmit, deliver, disclose, divulge, reveal, provide access to, etc.) and all the general forms of communication (e.g., verbal, written, pictorial, graphic, etc.) by whatever means accomplished. Communication to the general public is explicitly made applicable to all sections.

The terms "communications intelligence information" and "cryptographic information" relate to electronic surveillance of foreign powers, breaking their codes, and maintaining the confidentiality of our own codes. They are taken from 18 U.S.C. 798, and permit the absorption of that section into sections 1121-25.

"Information" is defined as including "any property from which information may be obtained," permitting the elimination of the "laundry-lists" of current law ("sketch, photograph, photographic negative, blueprint, plan, map, model" etc.) which, endless and redundant as they are, would otherwise have to be supplemented to reflect today's technology ("tape, punchcard, disk-pack, videotape, program * * *").

The term "information relating to the national defense" is drawn from 18 U.S.C. 793 and 794, and is intended to bring forward the complex of concepts enunciated in *Gorin v. United States*, 312 U.S. 19 (1941), and *United States v. Heine*, 151 F. 2d 813 (C.A. 2, 1945) *cert. denied*, 328 U.S. 833 (1946), i.e. that "national defense" is a broad generic concept signifying the military establishment and interrelated aspects of civilian support facilities; that the "information relating" thereto must be directly and rationally connected; that the information must be of a kind warranting secrecy for security reasons, which the government made an effort to restrict, or, at the very least, did not itself publicize or suffer to be freely disseminated, and which was not otherwise "in the public domain" and lawfully accessible to anyone who took the trouble to gather it. Consideration was given to incorporating expressly the *Gorin* and *Heine* concepts into the statutory definition, but, in light of the difficulty of reducing those concepts to statutory terminology while still leaving room for the judicial flexibility necessary to accommodate the fair application of the

law to unforeseen situations, it was ultimately concluded that the preferable course was to use the phrase occurring in the current statutes and to make it clear that the existing judicial constructions were intended to be carried forward.

The recommendation of the Brown Commission that, despite *Gorin's* acceptance of the propriety of using the term without statutory amplification, the statute should break down the generic-term "national defense" into illustrative subclasses drawn from prior cases and statutory material, has been followed.

Matter properly classified under E. O. 11652 would fall within the definition of "information relating to the national defense" in all cases, with the possible exception of some foreign affairs matters requiring secrecy, even though divulgence would not threaten the physical security of the United States.

The term "restricted area" is defined as an area containing a facility to which access is restricted by statute or executive order for reasons of national defense. This replaces the long list of facilities enumerated in 18 U.S.C. 793(a), which is so all-inclusive as to make particularization unnecessary. The restriction of the President's power to designate such areas to time of war and national emergency has been lifted to permit replacement of items from the eliminated list through selective designation.

Mr. MARONEY. I wish to assure the subcommittee that the Department of Justice fully appreciates the problems and concerns that impel debate on portions of the legislation we are discussing today.

Concern about this general area is legitimate. It causes us all concern. It causes us concern because it involves the necessity of striking a sensitive yet realistic balance between two matters of fundamental importance to our nation.

On the one hand we have the need to maintain a free and open society with as much information as is possible concerning the operations of its government.

On the other hand, we have the need of that society to protect itself from foreign attack and external disasters that can befall it. It is a problem that differs from the usual sort of criminal statute which involves a necessity of balancing the rights of the individual against the needs of society.

Here we have involved two rights of society itself, to some extent intertwined, to some extent conflicting. It is a difficult balance to strike.

We have made a studied effort, and we think a reasonable and responsible one, to strike this balance giving recognition both to desirability of the fullest possible disclosure of the public business and to the recognized need to protect information the disclosure of which could adversely affect the national defense.

For the most part we have attempted to parallel the existing law—section 1124 being the exception in this area.

Questions have been raised, however, as to whether these sections do, in fact, parallel the existing provisions.

To examine this question, however, requires first, a clear understanding of the exact reach of the current law, and second, a recognition that any attempt at recodification—in seeking simplicity and clarity—will of necessity vary in language from the existing provisions of law.

At this time, I would like, if I may, to direct my remarks to a few specific provisions of chapter 11 which appear to have generated considerable interest. I refer, of course, to sections 1121 through 1126.

Senator HRUSKA. Will the witness yield?

Is it not sections 1121 through 1126 of S. 1400?

MR. MARONEY. I believe that is right, Mr. Chairman.

Senator Hruska. I believe it is because we go by sections; the other goes by sections plus subdivisions.

The statement will be corrected to that extent.

MR. MARONEY. And particularly section 1122 (Disclosing National Defense Information), section 1123 (Mishandling National Defense Information) and section 1124 (Disclosing Classified Information).

Prior to discussing each of these sections, however, I would like to take a few moments to review the state of existing law in the area.

Espionage and related offenses are presently covered by a number of provisions in titles 18, 42 and 50 of the United States Code. The relevant provisions for purposes of this discussion are title 18, sections 793 and 798; title 42, section 2277; and title 50, section 783(b); 18 U.S.C., section 793(d) deals with various materials relating to the national defense and with persons in lawful possession of such materials. It prohibits the willful communication, delivery, or transmission of such materials to persons not entitled to receive them and the willful failure to deliver such materials on demand to government employees entitled to receive them.

In enumerating the materials sought to be protected, the statute distinguishes between such tangible things as documents, writings, code books, signal books and other specified items on the one hand, and "information" on the other.

To be protected, the tangible items need only relate to the national defense; "information", however, is afforded protection only if it relates to the national defense and the possessor has reason to believe that it could be used to the injury of the United States or to the advantage of any foreign nation.

This distinction, clearly set forth in the legislative history of the statute—Senate Rept. 427, 80th Cong., 1st Session (1949), p. 7; House Rept. 3112, 81st Congress, 2d Session (1950), p. 52.—was made, we believe, since the sources of information otherwise specifically enumerated in 793(d) and (c), are tangible objects which will in all likelihood, contain on their face a classification or which, by their very nature, will indicate to the individual handling them that they constitute the type of matter protected by the statute. With respect to information not derived from tangible sources the possessor may or may not be put on notice that this is so; 18 U.S.C., section 793(e) is identical to section 793(d) except that it applies to anyone in unauthorized possession and prohibits the retention of national defense materials and requires delivery to an authorized person without a demand being made.

These sections, 18 U.S.C. 793(d) and (c), are the primary basis for proposed section 1122 and are in part recodified by the proposed section.

As the subcommittee will note, section 1122 provides that a person is guilty of an offense if he knowingly communicates information relating to the national defense to a person not authorized to receive it.

The phrase "relating to the national defense" has been intentionally and carefully used in a deliberate attempt to preserve the judicial interpretations of existing law, including defenses, and the reci-

tation in section 1126 of the categories of information included within the phrase has also been drafted to reflect current law.

At this point it becomes necessary to consider what is meant by the statutory phrase "relating to the national defense."

The Supreme Court has approved jury instructions defining the term as a "generic concept of broad connotation referring not only to military, naval and air establishments, but to all related activities of national defense"—see *Gorin v. United States*, 312 U.S. 19, 28 (1941)—and has held that the phrase includes all matters directly and reasonably related to the national security in the context of protection of the United States against our enemies, holding also that the relation to national preparedness must be reasonable and direct, not strained or arbitrary. *Gorin v. United States*, *supra*, 312 U.S. at 30-31.

Also, as construed by the courts, the phrase is not limited to matters, and I quote, "vitally important or actually injurious. The document or information must be, however, connected with or related to the national defense." *Gorin v. United States*, 111 F. 2d 712, 717; see also *New York Times Co. v. United States*, 403 U.S. 713 at 740—Justice White concurring.

I would particularly note that the question whether information relates to the national defense is a jury question and that in reaching its decision a jury must examine the documents or information, consider the testimony of witnesses as to the significance of the information and as to the purpose and use to which the information contained therein could be put. *United States v. Drummond*, 354 F. 2d 132 (C.A. 2), cert. denied, 384 U.S. 1013.

Finally, most important, there can be no violation of statutes protecting "information relating to the national defense" if the information has been made available to the public by the Government, if the Government did not attempt to restrict its dissemination, or if the information was available to the public generally from lawfully accessible sources. *United States v. Heine*, 151 F. 2d 813—C.A. 2, 1945.

As already noted, the proposed statute has been intentionally drafted to embrace all these concepts of the phrase "information relating to the national defense."

The proposed section 1122, therefore, is not a departure from current law. The only manner in which it could be considered a departure from current law at all is that where written or other tangible material is not involved, and where the residual category "information" is the subject of the offense, there is not a specific inclusion of the present language that the possessor of the information has reason to believe that it could be used to the injury of the United States or to the advantage of a foreign power.

However, analysis demonstrates that this distinction is one of form rather than substance; the essence of the requirement still remains, and it was intended to remain.

As noted, 18 U.S.C. 793(d) and (e) reflect the specific notice element, not in a case of an individual possessing the tangible items specified, but only in a case involving the residual category "information."

The proposed statute requires that the communication of any information—from tangible or intangible sources—be a knowing communication.

Under the terms of section 303(b) of the proposed code, that culpability standard must apply to the conduct of the individual, any result, and any surrounding circumstances.

Thus 1122 would require a knowing communication of information which the person knew to be “information relating to the national defense” to a person or persons the individual knew were unauthorized recipients. “Knowingly” is defined by section 302.

Thus, as to any type of information—whether tangible or intangible in form, the proposed section requires a showing of the individual’s knowledge as to the nature of such information before subjecting the individual to criminal penalties for its disclosure.

Again, the nature of the information must be “information relating to the national defense” which includes all the concepts discussed earlier.

The proposed section 1123 covers intentionally or knowingly failing to deliver information relating to the national defense to Federal public officials or employee authorized to receive it—now covered by 18 U.S.C. 793(d) and (e)—recklessly permitting its loss, destruction, theft or communication to a person not authorized to receive it—now covered by 18 U.S.C. 793(f) (1)—and knowingly failing to report such loss, destruction, theft or communication—now covered by 18 U.S.C. 793(f) (2).

As is true of section 1122, section 1123 is intended to do no more than carry forward existing concepts of what constitutes information relating to the national defense and what activities are prohibited with respect to such information.

The final proposed section which I will discuss in detail is section 1124 which seeks to protect information which has been classified in order to restrict its dissemination for reasons of national security.

In this section, as opposed to sections 1122 and 1123, clear changes in current law are proposed. Some would expand current law; some would contract it.

I would like briefly to examine that existing law. As mentioned earlier, the statutes most relevant are 18 U.S.C. 798, 50 U.S.C. 783(b), and 42 U.S.C. 2277. 18 U.S.C. 798 makes it a crime for anyone to communicate a specific type of classified information—classified information relating to communications intelligence—to anyone not authorized to receive it.

While the classified information covered would appear to be very limited, it should be noted that by definition the phrase “communications intelligence” includes information obtained through communications intelligence methods which constitutes a very significant portion of the intelligence information we have concerning other countries.

I would note that the statute applies to anyone, and is not limited to those who have received the classified information pursuant to lawful authority; 50 U.S.C. 783(b) makes it a crime for any Government employee or any employee of any corporation, the stock of which is held in whole or in major part by the United States, to communicate any classified information to an agent of a foreign

power or to officers or members of certain Communist organizations, including the Communist Party, Communist fronts, and Communist infiltrated organizations.

I would note that this statute, while specifying the type of recipient, is applicable to any classified information and applies to any Government employee or employee of certain corporations and is not limited to those employees who have received the classified information pursuant to lawful authority.

Finally, to complete this brief review of the most pertinent present legislation, there is section 2277 of title 42. This statute makes it a crime for anyone who is or has been a Government employee or a member of the Atomic Energy Commission or of the Armed Forces, or who is or has been connected with the Atomic Energy Commission under a contract with the AEC, to communicate any restricted data to any person not authorized to receive it.

This statute is apparently limited to those who are most likely to receive the classified information pursuant to lawful authority, applies to a special type of classified information, and prohibits the communication to anyone not authorized to receive the information.

The concept inherent in these present statutory provisions that it is not a defense that the information was improperly classified has been judically sustained. *Scarbeck v. United States*, 317 F. 2d 546 (C.A.D.C.), cert. denied, 374 U.S. 856, involving 50 U.S.C. 783(b).

Thus, in prosecutions brought pursuant to these statutes, it is not necessary to establish that the information related to the national defense but only that the information was marked or designated pursuant to lawful authority as affecting the security of the United States—*Scarbeck, supra*, 317 F. 2d at 557-560.

The congressional purpose in establishing these procedures was, of course, to permit prosecution for the compromise of national security information without the necessity at trial of disclosing the very information the statutes seek to protect.

Proposed section 1124, like those statutes just discussed, deals with the disclosure of classified information. This section is limited in its application to persons who have or have had authorized possession of classified information or who have obtained such information as a result of being a Federal public servant.

Such persons are prohibited from communicating the classified information which they have received in trust to persons who they know are not authorized to receive it.

While it is a defense to prosecution under this section that the information was communicated to a regularly constituted committee of Congress pursuant to lawful demand, it is not a defense that the information was improperly classified as to substance, either at the time of its classification or at the time of the offense.

The section is aimed only at disclosure by persons entrusted with classified information; it specifically precludes prosecution, either as an accomplice or coconspirator, of a person to whom the information is communicated.

"Classified information" is defined in section 1126 as any information which has been marked or designated pursuant to the provisions of a statute or Executive order, or a regulation or rule thereunder,

as information requiring a specific degree of protection against unauthorized disclosure for reasons of national security.

As I mentioned earlier, unlike the proposed provisions relating to national defense information, this section does propose certain changes in current law.

As just discussed, present law prohibits either (1) the communication by anyone of specific types of classified information to anyone not authorized to receive it; or, (2) the communication of any classified information by specific categories of persons—Government or certain corporate employees—to specific categories of persons—agents of a foreign power or members of specified Communist organizations.

The proposed statute departs from current law in combining the concept of 50 U.S.C. 783(b) of the protection of all classified information with the prohibition of 18 U.S.C. 798 and 42 U.S.C. 2277 of communication to any unauthorized person or persons.

While this approach thus broadens present law to some extent, the proposed section also departs from current law by narrowing it.

Unlike 18 U.S.C. 798 which applies to any person, and unlike 50 U.S.C. 783(b) which applies to any Government employee or any employee of certain corporations, proposed section 1124 applies to a limited class—those individuals who have or have obtained classified information pursuant to authority or as a result of being a Federal public servant.

In short, 1124 applies only to those who obtain classified information in a position of trust—not to any person or to any Government employee.

A much more significant departure from current law, moreover, is the treatment of recipients of improperly divulged classified information under proposed section 1124.

As I have mentioned, no recipients are subject to prosecution under this section. Under the law presently in effect, unauthorized recipients of classified information could be prosecuted either as accomplices or as conspirators consistent, of course, with the terms of the statutes discussed.

Perhaps at this point it might be useful to say a few words about the legal basis upon which classification authority and responsibility have been vested in the executive branch and what the Executive has done in the exercise of that authority and the discharge of that responsibility.

Numerous statutes, including some of those discussed today and including the Freedom of Information Act, and numerous court decisions have recognized the President's authority and responsibility to protect information vital to the national security.

The President, in turn, in the discharge of this responsibility, has issued Executive orders.

The most recent such Executive order is No. 11652, issued in March of 1972 to replace No. 10501, issued in November of 1953.

This new Executive order significantly tightens procedures for classification of national defense information, both by limiting the number of individuals with authority to classify and by imposing stricter standards for the classification of information. Equally important, the Executive order for the first time establishes the princi-

ple of individual accountability for classification, provides specific review procedures to insure that the standards imposed are not violated, and establishes an Interagency Classification Review Committee to monitor the implementation of the order.

This committee is expressly directed to receive and take action on suggestions and complaints from persons within or without the government concerning the administration of the order, including complaints about unnecessary classification or overclassification of information so that individuals who feel that information is improperly classified for improper purposes are given ample opportunities under the Executive order for thorough review of such matters.

In short, the Executive order represents a vigorous attempt to insure that the only information classified is information which meets stringent standards of potential for damage to national security if disclosed to unauthorized persons.

That this attempt has already met with success is attested by last week's interim report by the committee to the President.

Among other accomplishments already reported by the committee was a 63 percent reduction in the number of all authorized top secret, secret and confidential classifiers (exclusive of CIA) from almost 49,000 to fewer than 18,000. This achievement and others detailed in the report and the continuing efforts along these lines should go a long way to insure the success of the reform of classification procedures initiated by Executive Order 11652.

The statutes and cases to which I referred as recognizing the Executive power and duty to protect classified information flow from a recognition that there must be restrictions on the dissemination of certain information to protect the national security, or, as put more succinctly by Justice Stewart, "in the area of basic self-defense the frequent need for absolute secrecy is, of course, self-evident." *New York Times Co. v. United States*, 403 U.S. 713, 728.

If information vital to our national security is to be protected, the need for the provisions of section 1124 is readily demonstrated.

Simply consider the situation that would exist in the absence of such a provision. Absent a prohibition of disclosure of classified information to persons not authorized to receive it, an individual who violated his trust by wrongfully disclosing such information could be prosecuted only under laws relating to disclosure of information relating to the national defense.

In such a prosecution, we would be required to prove to a jury beyond a reasonable doubt that the information in fact related to the national defense. And I would hasten to note that the point here is not the difficulty of sustaining this burden of proof; the point is the consequence of doing so. In attempting to prove this element of the crime we would have to reveal the very information which the law seeks to protect. And as we have pointed out above, it was this result which Congress sought to avoid in the present 18 U.S.C. 798 and 50 U.S.C. 783(b).

We believe it is unreasonable to be able to protect national security only at the expense of endangering it in this manner. This is a concern generated by very real problems. In recent years the Department of Justice has had to forego a significant number of prose-

cutions for misuse of information vital to the national security because the information could not be made public for security reasons.

Proposed section 1125, as does present 50 U.S.C. 783(c), makes criminal the obtaining of classified information by an agent of a foreign power. If an individual who received the classified information under conditions of trust were apprehended in the act of passing such information to such a person, it would be unthinkable that we could prosecute the agent for doing his job, but not prosecute the transmitter for violating his trust without disclosing vital national security secrets in order to do so.

By the same token, the individual should be similarly subject to prosecution when he discloses classified information to any unauthorized person in violation of his trust.

Again, individuals who feel that information is improperly classified or classified for improper purposes are not without a remedy. They are given ample opportunities under the Executive order for thorough review of such matters.

These considerations are underscored by the consideration that it is, of course, the most sensitive information that generally cannot be disclosed for prosecution purposes under the more serious espionage statutes. So we can well have the ironic result of being able to protect less serious information under the more severe statutes, while not being able effectively to protect extremely important information from betrayal of trust.

Mr. Chairman, I hope my remarks today have been helpful to the subcommittee in facing the issues raised by the national defense information and classified information provisions proposed in S. 1400. These provisions have been carefully drafted in a studied and earnest attempt to permit maximum disclosure consistent with safeguarding the national defense. We believe we have succeeded in this attempt, and we urge favorable consideration of our proposals by this subcommittee.

Thank you, Mr. Chairman.

Senator HRUSKA. Thank you, Mr. Maroney.

You have made reference to a report of the Interagency Classification Review Committee.

Will staff please take note of that and if that report is not already in the files of the subcommittee, procure it so that we may make an abstract or make such reference to it as necessary in the transcript.

Mr. MARONEY. We have a copy of it, Mr. Chairman, and we will submit it to the staff.

Senator HRUSKA. Very well.

Mr. Maroney, among the comments which have been made concerning your proposed national security statutes, is that they would punish Government officials who disclose almost any kind of defense or foreign policy information, whether or not its disclosure would endanger national security.

Would you care to comment on the validity of that observation?

Mr. MARONEY. Well, I think it is an invalid criticism. Under the terms of the Executive Order 11652, information can only be classified if the disclosure would injure the national security, so that any information classified pursuant to that Executive order is put to the

test as to whether or not its disclosure would endanger natural security.

Now, part of the criticism is that a mistake may be made, misjudgment may be made, as to whether or not the disclosure of particular information would in fact injure the national security. The Executive order builds in a remedy for that possibility, and that provides for, as you just indicated, the Interagency Classification Review Committee, which is a committee established at the White House level, which is given the primary responsibility on a government-wide basis to insure that all the departments of Government who have responsibilities under this Executive order are carrying out the purposes of the order and following the mandate of the order.

Each department of the Federal Government which has classification responsibilities under the Executive order is required to establish its own department review committee, and that department review committee is charged with the overall implementation of the Executive order in that particular department. It is charged with receiving and passing upon any complaints either from employees or from the general public as to the overclassification of a particular document and to review any document concerning which such complaint is made for purpose of making an independent judgment as to whether or not the classification is proper.

We think that those provisions of the Executive order build in a remedy against abuse or mistake in the classification process.

Senator HRUSKA. But it is not any kind of defense or foreign policy information for which Government officials can be prosecuted is it?

It is to be information of a certain kind, information the disclosure of which would in fact be injurious to the national security or endanger us either here or abroad.

And the determination of that fact, aside from classified information, is made by the jury: isn't it?

Mr. MARONEY. Well, it is made by the jury in the provisions that relate or speak in terms of information relating to the national defense.

Senator HRUSKA. That is right.

Mr. MARONEY. And in those situations where we would be proceeding under proposed section 1121, 1122 or 1123, it would be incumbent upon the Government, as presently under 18 U.S.C., sections 793 and 794, to prove that the information compromised did in fact relate to the national defense within the meaning of the *Gorin* decision (312 U.S. 19), which we referred to in the statement, and the jury would have to be satisfied beyond a reasonable doubt that the information did so relate and that the compromise could result in injury to the United States or to the advantage of a foreign power.

Senator HRUSKA. Now as to section 1124, we have a different situation; haven't we?

Mr. MARONEY. Yes, Sir.

Senator HRUSKA. It is recognized without any dispute that there are certain kinds of Government information and records that must

be held confidential at least for a certain period of time and until their purposes have been served.

Someone must classify them. Someone must say: secret or top secret, or confidential.

Now, then, when information so branded comes to an employee or an official of a department, any department, whatever it is, and he undertakes to give that to somebody who is unauthorized, is it not true that he betrays his trust?

Mr. MARONEY. We think so.

Senator HRUSKA. The conditions of his employment are that whenever material is so marked he cannot challenge its propriety to the extent of disclosing it to an unauthorized person?

Mr. MARONEY. That is correct, Mr. Chairman.

Senator HRUSKA. But he may disclose it to a Congressional committee under S. 1400, and under the terms of that classification act which was submitted in March last year and which went into effect, I believe, on June 1, under that classification act he can go to the Inter-agency Classification Review Committee and say, "Gentlemen, this is improperly done."

Mr. MARONEY. That is correct, Mr. Chairman.

Senator HRUSKA. And that would serve the purposes of the well being of this nation.

Mr. MARONEY. We think it would.

Senator HRUSKA. But certainly if he can go to the extent of either printing his newspaper or disclosing that information either to a newspaper, magazine or radio, or TV commentator, and say, in defense, when he is charged, that well, that is an improper classification; that type of conduct and that type of rule would mean there would be no classification of enforceable nature whatsoever. Isn't that the consequence of it?

Mr. MARONEY. Well, the consequence is that in some instances where that would occur because of the nature of the information and even the continued sensitivity of the information, it could not be declassified for purposes of trial, so we would not have available at the trial the proof necessary to establish that it did in fact relate to the national defense.

Senator HRUSKA. And rather than to disclose the information that would be so vital and so necessary, there is a necessary refraining from prosecution; isn't that the consequence?

Mr. MARONEY. That is the case.

Senator HRUSKA. Now the person under section 1124, who receives that information under the hypothetical case we just gave, is he liable to punishment?

Mr. MARONEY. He is not. He is specifically exempt.

Senator HRUSKA. He is specifically exempt.

Now, then, the denial of a defense of improper classification to the employee or the official who discloses information which has been classified as secret or top secret, was the subject of a lawsuit, was it not, entitled *Scarbeck* against—

Mr. MARONEY. *Scarbeck v. United States*, 317 F. 2d 546 (C.A.D.C., 1962), *certiorari denied*, 374 U.S. 856 (1963).

Senator HRUSKA. Would you briefly tell us what the holding in that case was?

Mr. MARONEY. Scarbeck was an employee of the State Department at the time, and the charge and proof at trial was that he had furnished classified information to an agent of a foreign government. He was charged and tried under the provisions of 50 U.S.C. 783, which is a somewhat similar provision to 1124 and which we have drawn upon in part in drafting 1124.

The court in the *Scarbeck* case held that the defendant, under that provision of law, could not defend on the contention that the information was in fact improperly classified as to substance; that the fact that it was classified, that he was a Government official entrusted with the information and that it was the intent of Congress to protect the information which had been classified pursuant to law was sufficient to establish his guilt under that statute.

Senator HRUSKA. And underlying that decision is the proposition that any other holding and the allowance of the defense of improper classification would mean a complete destruction of the system of classification of Government documents; is that not so?

Mr. MARONEY. That is right.

It would permit any official who chose to do so to impose his own judgment over a person who may have classified the information, who may have been in a much better position to know of factors which warranted the classification, and prevent a situation where when such a disclosure is made, the Government is put in the dilemma of having to come forward and disclose the information which is sought to be protected in order to successfully prosecute the individual who had done that.

Senator HRUSKA. And that part of section 1124 which expressly says that improper classification is not a defense is a reflection of what the law of the land is today by reason of the present statute together with judicial interpretation; am I correct in making such a statement?

Mr. MARONEY. That is our view, yes.

Senator HRUSKA. So that it is not necessarily a national secrecy act of 1973, because that particular law which is law today was enacted back in 1948 or 1949?

Mr. MARONEY. 1950, I think it was.

Senator HRUSKA. I believe you testified that generally speaking, the thrust and the spirit of the provisions that are contained in sections 1121 to 1126 seek to carry forward the law of the land as it is today with necessary changes in language by way of incorporating into these proposals the results of judicial interpretation, for example, and other elements of that kind?

Mr. MARONEY. That is exactly right, sir.

Senator HRUSKA. Now, you mentioned Executive Order 11652. That is the order that replaced the order of 1953, I believe. Isn't it true that, in addition to tightening up the classification procedures severely, that order for the first time also imposes administrative penalties on classifiers who violate its provisions?

Mr. MARONEY. It does provide for administrative penalties to be recommended by the Department Review Committee of the department concerned where such abuse may occur and for the overall supervision of that by the interagency committee.

Senator HRUSKA. So that those charged with classifying the documents would be presumably conversant with the Freedom of Information Act, for example. They would be charged with the provisions, guidelines, and standards contained in that Executive Order No. 11652, and if they make an error and improperly classify with all those things in mind, they are now for the first time subject to administrative penalty?

Mr. MARONEY. That's right.

I think there is one other important item that is required by the new Executive order, and that is personal accountability as to the person who classifies a document. It must appear on the face of each classified document what specific officer of the Government gave that classification to the document, so that he is accountable directly to the supervision of the department review committee and the interagency review committee.

Senator HRUSKA. Now, several commentators and critics of the statute have indicated particular concern about the possible treatment of newsmen under the proposed provisions.

For example, it has been claimed that these proposals would punish newsmen who receive any kind of defense or foreign policy information unless they promptly report the disclosure and return the material to the Government, whether or not its disclosure would endanger national security.

You have answered that question in part as to the "any kind of information."

But in view of the understandable concern over newsmen's rights—and they go beyond newsmen's rights because they are the rights of the public as well—would you explain how your proposals differ from existing laws in this respect if they differ at all?

Mr. MARONEY. Well, of course, under section 1124, such persons would be specifically exempt from possible prosecution for a violation of that section.

As for the remaining parts of sections 1121 to 1126, we believe it leaves newsmen in the status quo that exists today, in the exact same position that they are in today.

Senator HRUSKA. And of course in the *Times* case [*New York Times Co. v. United States*, 403 U.S. 713 (1972)], I believe there was comment on the idea that there are situations where even the first amendment in this whole area has to bend a little bit and sometimes even be sacrificed when a nation is engaged in that effort to survive, which is its first responsibility.

Certainly there are kinds of information that, if revealed, would threaten the survival of a nation or badly impair its position or endanger its continued progress. Witness the weapons systems for example, the Trident. There has to be an evaluation of certain constitutional rights, and one must bend to the other.

Mr. MARONEY. That is right, sir.

Senator HRUSKA. And sometimes it is thought that the right and the responsibility of a nation to survive and make every effort to do so transcends many other ephemeral or fancied rights of many citizens and institutions of this Republic.

Mr. MARONEY. I think that is right, Senator, and I think that a number of the opinions of the Supreme Court in the *New York Times* case clearly recognized that requirement.

Information of that kind, the disclosure of which could endanger national security, is presently protected by section 793 and 794, and it would be protected by 1121 to 22 under the new proposal. We feel there is no difference, in that kind of situation, in the redraft of the new Code as compared with existing law.

Senator HRUSKA. Of course, that is not where the trouble is; is it?

The trouble is not where the type of information would patently endanger national security, nor is the trouble in the cases where a classification is put on a bit of information that is trivial and is an indiscriminate label of the information as being top secret or whatever. The trouble is between those two extremes, isn't it?

Mr. MARONEY. Well, of course, there is a grey area, as in everything else, where it is more problematical. But in any situation involving a disclosure of information relating to the national defense under present law, and under the proposed revision, the Government would be required in a prosecution of anybody to satisfy a jury beyond a reasonable doubt that it did in fact meet the test of the *Gorin* decision.

Senator HRUSKA. Now, the next witness who will testify before us this morning, Mr. Landau, recently wrote an article in which he stated that your proposed consolidated theft statute, Section 1731 of S. 1400, would be used for prosecuting a reporter for publishing the contents of a classified document regardless of whether they had any connection with national security.

I realize the theft provisions are beyond the scope of our inquiry, but I wonder whether you would be willing to reflect on Mr. Landau's testimony at this time.

It is by way of anticipated testimony on his part and by way of the article he wrote that will be in evidence. He will be able to make a response to your comment.

Would you like to comment and respond to his criticism?

Mr. MARONEY. Mr. Chairman, only to say that I have not had the opportunity to focus on section 641 of title 18.

I am advised by Mr. Gainer, who has been very active in the drafting of this legislation, that 641 was not intended certainly to cover the situation referred to by Mr. Landau, and I think it would be the appropriate time for the Department to focus in on that and comment to the committee when 641 comes before the subcommittee.

Senator HRUSKA. 641 is present law. Well, suppose we suggest, then, that in due time commentary on that may be furnished to Mr. Landau, so he may have surrebuttal if he wants to do so?

Mr. MARONEY. I will do that.

Senator HRUSKA. Now, the exemption under section 1124, of the recipient of information exempts him from any prosecution from conspiracy or for allied items, does it not?

Mr. MARONEY. That is right, sir.

Senator HRUSKA. I have other questions, however, I will hold them in abeyance and suggest at this time if the Senator from Michigan has any questions now is the time for him to come forward.

Senator HART. Thank you, Mr. Chairman.

Before I forget, you indicated that you would be filing with us a written memorandum that would be incorporated in the record later.

I would suggest, Mr. Chairman, that perhaps for all of us, we

ought to reserve the right to have an opportunity to review that memorandum and raise with you in writing such questions as the memorandum may raise in order that we may obtain responses from you in order that they too can be in the record.

Senator HRUSKA. That is a reasonable request and I am sure that the witness will furnish each member of the committee with copies of that memorandum.

And I would suggest, Senator Hart, the interest of the committee should not be limited to written interrogatories but if there is a request for same, we can call Mr. Maroney back here and engage him in such colloquy as would be suitable under the circumstances.

Senator HART. Thank you very much, Mr. Chairman.

Just as Senator Hruska, I do have some questions bearing on these sections of S. 1400 that deal with espionage and related matters, but before getting to them, let me suggest the general nature of my concern about certain aspects of proposals that you make in this area.

I do understand that there is a great deal of controversy about the state of the present law, particularly its applicability to specific factual situations.

I would like to concentrate on what S. 1400 would do as those of you who drafted it intended how it should work, and explore with you what kinds of laws we should be drafting now to prevent espionage and to safeguard information whose disclosure would endanger the security of the country.

Now, as Senator Hruska has observed, the Senator argued that the effect of the provisions in S. 1400 would not be to impose an official secrets act in this country, something that, of course, Congress historically has resisted.

As I get it, the fear here is that the statutes would give the Justice Department the power to prosecute anyone who discussed information which had relation, any relation, to the national defense effort regardless of the purpose of the person who was discussing it, or whether in fact the information disclosed to another or made public actually would injure our security or, if it had been classified, without regard to its content at all, and I am not suggesting that is the case.

That is the concern. None of us need belabor the examples that have been revealed in recent years of abuse of the classification system and the idiocy of it.

Nor do we have to emphasize, in light of recent events, the importance of a vigorous unintimidated free press, free to investigate matters of public interest. Our obligation is to assure it is not reduced to simply a transmission belt for public speeches and press conference statements and press releases from public officials.

Now, with that as the reason for our concern, let me see—and I believe you have answered this—let me see if we can explore the general constitutional framework which the Justice Department applied in framing these particular provisions.

There is a legitimate constitutional duty and purpose in protecting the security of the country from outside threat.

Mr. MARONEY. Yes, sir.

Senator HART. There are some who would expand this national security concept to include a very wide variety of interests,

diplomatic, economic and other interests, which it might be comfortable for us to achieve, but which really aren't related to our national defense against foreign threats to our security except in the most indirect sense.

Let us grant that there is some national security interest which requires safeguarding some information from disclosure from our potential adversaries.

My question is this, and I believe you have answered it firmly in your statement: Does the Department view the issue, which we confront here in these sections, as one of balancing this security concern in national security interest against the first amendment interest of the people and the press and the importance of the public's right to know as the basis of a government which functions as the result of an informed citizenry?

Mr. MARONEY. I think that is right, Senator, and I think that the Supreme Court in countenancing the test as to what information is properly regarded as information relating to the national defense, and therefore should be withheld or at least is within the power of the Executive to withhold, recognizes that problem.

May I also state here that your concern about the prior overclassification problem, or abuse, if you will, of the classification system, was recognized by the President and was one of the principal factors in leading to the issuance a little over a year ago of the new Executive order. And it was issued precisely for that purpose, to tighten up and to restrict the classification system in the Government and to insure that it is only applied to information that can injure the country.

Senator HARR. Well, under the thoughtful reminder voiced by the chairman in his opening statement, I will be very blase about my reaction to your last comment, but don't you think that recent events do raise a question about the adequacy of leaving protection of the public's right to know to the officials of any administration when disclosure might be embarrassing politically or economically?

Mr. MARONEY. Of course, it isn't ultimately in all circumstances left exclusively within the Executive. For example, if there is a prosecution for a compromise of national defense information, the ultimate question to be proved at the trial by the Government is whether it does in fact come within the standard set forth in *Gorin*. So it isn't a final determination made by the Government which no one can challenge. The only case where that would be the situation would be in applying section 1124.

Senator HARR. In that case there is no defense; the classification can be idiotic, self-serving, irresponsible, a cover for anything.

Mr. MARONEY. Except we submit there is a remedy for that kind of a situation built into the present Executive order.

Senator HARR. Then you are back to the Executive.

Mr. MARONEY. Well, that is right.

In the first place, it was a restricted——

Senator HARR. That is why I initially reacted as I did.

Mr. MARONEY. In the first place, it only applies to a limited number of individuals, and that is those people entrusted with the safeguarding of the information. It doesn't apply across the board to everybody in the American society. There is no possibility under

that provision for a newspaperman ever to be prosecuted or for an individual citizen to be prosecuted under that provision.

Senator HART. Well, we will get back to that later because, as I understand it, a newspaperman can be prosecuted but not under 1124 and not if he immediately returns what was given to him and never publishes.

Except under those circumstances, he can be prosecuted?

Mr. MARONEY. But in that event the Government would have to show not simply that it was classified; the Government would have to show what the information was, that it did in fact relate to the national defense, and satisfy the jury that it met the test of *Gorin* concerning information relating to the national defense. That would have to be shown beyond a reasonable doubt to a jury.

Senator HART. We will get to the adequacy of that standard, which may be adequate, as we go along.

I think in fairness to Senator Cook and Senator Hruska, I will follow now the questions and hope to finish up.

But this again is a basic concept inquiry, I suppose.

We are agreed that, in a society structured such as ours, First Amendment rights have to be balanced against considerations of national security in determining how much information this Government has the power under the Constitution to keep secret.

Now, isn't that balancing of constitutional rights and obligations which deal with conflicts between First Amendment claims and national survival precisely the kind of balancing which under our system cannot be allocated exclusively to the Executive?

Mr. MARONEY. I agree.

Senator HART. Nor can we assert this as a collective Congress, but ultimately it must be the subject of judicial review?

Now, think a minute before you answer that.

Mr. MARONEY. If a prosecution is brought, a criminal prosecution is brought, against an individual—let us leave out 1124 because that is a special statute applying to a special category of person—with respect to the other provisions, they do provide for judicial review in the process of a criminal trial. That is to meet the standards required by law to the satisfaction of a jury.

Now, we have been in exactly that same situation for 50 years. The present espionage laws have the same requirement, and if we prosecute someone today under 793 or 794, for disclosure of information relating to the national defense, and we bring an indictment against that person at the trial, we have to justify it.

Senator HART. Under 1124 isn't it the Executive that does the balancing of that classification?

Mr. MARONEY. That is right.

Senator HART. No one else can challenge that decision?

Mr. MARONEY. That is right. But that is the same situation that exists under 783(b) today and a couple of other sections that I referred to.

Senator HART. I agree with you.

As I say, I think part of our responsibility is to determine what the law should be if it is changed.

Some specific provisions of S. 1400, namely, section 1122, that is, disclosing defense information, makes it a felony for anyone to com-

municate information relating to the national defense to somebody not authorized to get that information.

Communicating is defined to include publishing to the general public.

If we look at 1121, the preceding section, we find a provision more clearly directed at espionage, otherwise making harmful information available to the public, section 1121.

Section 1121 forbids communication of information to a foreign power or collecting it with intent that it may be communicated to a foreign power.

The accused, under section 1121, must intend the information will be used, or may be used, to prejudice the safety or interest of the United States.

I would assume that would include publishing material in a newspaper.

Why does the Administration feel that section 1121 itself is inadequate to protect the United States from authorized disclosure of legitimate secrets which could harm our security?

Why do we need section 1122?

Mr. MARONEY. In the first place, the present statutes, 18 U.S.C. 793 and 794, do not require the specific intent for all provisions of those sections. For example, 793(d) and (e) really track the provisions of section 1122 in the new provision.

You can, for example, have a situation where the person does that for some other reason than intending to injure the United States or giving information to a foreign power. For example, suppose a person having access to technical classified material relating to weapons furnishes information to an industrialist who is not authorized to receive it for purposes of putting him in a better position to bid on a government contract. There you have a situation where the individual has disclosed classified information clearly relating to military weaponry, clearly entitled to protection under anybody's understanding of the secrecy requirements of the government, and he is not intending to harm the United States or to aid a foreign country.

But he is endangering that information by putting it in the hands of a person not authorized to receive it, where control of the information will be lost to the Government, and we think that kind of situation should be covered.

Senator HART. Well, under section 1122, would it be a defense? The disclosure of the information wouldn't harm American security?

It is not just related to the defense, but that it wouldn't harm the security of this country?

Mr. MARONEY. The test is if it could injure the United States, or be to the advantage of a foreign nation. You do not have to show—

Senator HART. I don't find that in section 1122. You have got that in section 1121.

Mr. MARONEY. Well, it keeps the phraseology with the judicial gloss that is already on it, of "information relating to the national defense."

Senator HART. Remember in your statement, you cited the *Gorin* case [*Gorin v. United States*, 312 U.S. 19 (1941).] as saying it didn't have to.

Mr. MARONEY. You don't have to show that it actually resulted in harm; but you do have to show that the disclosure could harm the United States or could be to the advantage of a foreign nation.

Senator HART. Well, that should be made clear, should it not?

Mr. MARONEY. I think the Executive order makes it clear.

Senator HART. I know, and those change, and we are writing a law.

Shouldn't we make it clear? How about putting it in the definition?

Mr. MARONEY. Well, it isn't in the present espionage statutes.

Senator HART. I know, but we are here hopefully to do better.

Mr. MARONEY. But the phraseology in the present espionage statutes has been sanctioned by the Supreme Court, and the test imposed by *Gorin* has been held to be a sufficient test.

Senator Cook. Would the Senator yield?

Senator HART. Sure.

Senator Cook. May I read from the *Scarbeck* case [*Scarbeck v. United States*, 317 F. 2d 546 (C.A.D.C., 1962), *certiorari denied*, 374 U.S. 856 (1963).] pertinent to the discussion and then I think it might add more to the discussion in relation to what Senator Hart has just said.

In the *Scarbeck* case under 783(b) the Court said:

There is no suggestion in the language of 783(b) by specific requirement or otherwise that the information must properly have been classified as affecting the security of the United States. The essence of the offense described by 783(b) is the communication by a United States employee to agents of a foreign government of information of a kind which has been classified by designated officials as affecting the security of the United States, knowing or having reason to know that that has been so classified.

Gentlemen: Now, the thing that bothers me about it is that we depend on the fact that this is one of three categories and do not depend on the significance of the actual content.

I think that is the question that the Senator from Michigan raised, if I am not mistaken.

I am only adding that language not to totally and completely agree with it, but to add to the dialogue.

Senator HART. Good.

Let us get to the *Scarbeck* case in a minute even more fully.

But I commented on your reference to the *Gorin* case.

As I read that, it pointed out that the statute involved there required bad faith, either intent to harm or other disregard.

The court said:

We find no uncertainty in this statute which deprives a person of the ability to predetermine whether a contemplated action is criminal under the provisions of this law. The obvious delineating words in the statute requiring intent or reason to believe that the information to be obtained is to be used to the injury of the United States or to the advantage of any foreign nation. This requires those prosecuted to have acted in bad faith. Sanction is applied only when—

I return to another question.

Would it not be desirable that in 1122, that there be available to the defendant expressly the right to show that it didn't hurt the country, the national defense, the national security?

Mr. MARONEY. The right to show that it could not possibly injure the United States or advantage a foreign nation?

Senator HARR. Well, make available to them at least the right to establish that in some measure or degree it had no relationship or adverse effect on our national security.

Mr. MARONEY. I think he has that defense under 1121 and 1122 just as he has it today under 793 and 794.

Senator HARR. You have got it expressly included in the 1121.

You don't in 1122 and I ask you why not, and why it wouldn't be desirable?

Mr. MARONEY. In 1121 it is "with the intent."

Senator HARR. I see.

You can be prosecuted with 1122 and shouldn't you either have some intent or harm to the country before you go to jail for—

Mr. MARONEY. Under 1122, in the example that we discussed earlier, we don't think he should have to have the intent, the specific intent to injure. The question is whether or not the information which is unlawfully compromised could injure the United States or advantage a foreign nation, not whether he intended that to result from it. This is precisely the situation we are in today again, I say. I think that is a reasonable distinction.

Certainly information which is properly classified under this Executive order as being information, the disclosure of which could damage the security of the United States, is entitled to protection, and whether or not it is protected by law should not always and in every case depend on an intent to injure the United States. It could be for some other purpose such as we mentioned, to get an economic advantage or some such reason as that.

Senator HARR. Well, if 1122 required showing either an intent to harm the security of the United States or reason to believe that it would harm, could harm or in the alternative, showing that the disclosure was actually harmful, wouldn't that cover your real concerns and at the same time avoid what could be called excessive exposure to criminal prosecution for people seeking to inform the public?

Mr. MARONEY. Of course, under 1122, he is required to know before he could be guilty of a violation that the information does in fact relate to the national defense and thus that the disclosure could injure the United States.

Those elements are necessary to be present.

Senator HARR. We are talking about 1122?

Mr. MARONEY. Yes, sir.

Senator HARR. Where is this second point you make in 1122?

Mr. MARONEY. If he "knowingly" communicates information relating to the national defense. Under the culpability provision which I referred to, the general culpability provision of the code, a person must be shown to have knowledge of each element of the crime. One element of this crime is that the information, in fact, relates to the national defense. We would have to show he knew it was "information relating to the national defense," and thus that the disclosure could injure the United States.

Under the Executive order, the test, for example, for each of the categories, top secret, secret, and confidential—

Senator HART. I just want to stay with 1122, if in fact the drafters believe that it is required there be some hurt or utter disregard to the national security, I am satisfied.

As a potential defendant, I would be more comfortable if we had it spelled out if I interpret correctly what you are saying.

Mr. MARONEY. That there has to be some actual injury?

Senator HART. Not merely actual injury, but reason to believe or intent to harm.

Mr. MARONEY. Right.

Not intent to harm or——

Senator HART. Or, or.

Mr. MARONEY. That there has to be.

Senator HART. Intention to hurt or intention——

Mr. MARONEY. Reason to believe that the information could injure the United States?

Senator HRUSKA. Would the Senator yield for a suggestion on that specific point?

I believe that in your statement, Mr. Maroney, you said that section 1122 is a codification of 18 U.S.C. 793 (d) and (e).

It is to be observed that that section does contain, express language like that to which you refer, Senator Hart. It starts off by saying 793(d): Whoever lawfully having possession of or access to or control and so on, of information relating to the national defense, which information the "possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, wilfully communicates . . ." and so on.

Is it that which is not carried forward in section 1122, unless there is a reference to it someplace else? As contained in the proposed law, 1122 does not recite that and express it, does it?

Mr. MARONEY. That is right, and we think it should be read into this language, because of the provisions that he act knowingly.

Senator HRUSKA. Would there be any objections to setting out this language expressly?

Senator HART. I am satisfied.

Senator Cook. Would the Senator yield?

I am not satisfied.

Senator HART. Well, I am not satisfied that the language to which Senator Hruska refers is fully adequate.

I am satisfied we have demonstrated there is the need for this provision.

Senator Cook. Would the Senator yield?

Mr. Maroney, the thing that bothers me about the language in section 1122, a person is guilty of an offense if he knowingly communicates information relating to the national defense.

You said in this instance the individual would be protected because you have to establish that he communicated information relating to the national defense and that he did it knowingly.

Now, the point I am trying to raise is that in reading the cases, not only the *Gorin* case, but also the *Scarbeck* case, "knowingly" is imputed when there is a classification.

Here we have in the *Scarbeck* case three dispatches that were shown to the Polish Government; they made copies of them, and yet

the jury in the United States never had an opportunity to see the copies of those documents to make that assessment, the knowing was the fact that the defendant in that case saw on the outside cover that they had a classification.

So we are not really getting to what you are talking about and we are not really reaching what Senator Hart was inquiring about and that is the essence of the material itself.

In this instance, the thing that bothers me about your interpretation of 1122 is a person is guilty of an offense if he knowingly communicates information relating to the national defense to a person not authorized to receive it.

The courts have carte blanche said that the knowing is immediately attributable to a defendant if the particular document has any one of three classifications, top secret, secret, or confidential.

Scarbeck is a long decision, but nowhere in it did it ever indicate that the jury had an opportunity to look at the material for which the defendant received three 10-year sentences, and yet we say it was to the best interests of the Government not to show that material and yet the Polish Government that was interested in it already had it.

Mr. MARONEY. The *Scarbeck* situation was comparable to the situation which would exist in a prosecution under 1124, where the Government does not have to show other than the fact that the information was classified.

Senator COOK. That is correct.

Mr. MARONEY. And the defendant cannot go behind that classification.

In 1122, and 1121, the defendant can challenge the substance of information and whether or not it does relate to the national defense.

Senator COOK. I am not sure I agree with what you are saying, because the language in 1122 as interpreted by the courts is very specific that the knowing is in the classification, and that having a classification the defendant had knowledge that he is giving information that was vital to the national interests and the national defense of the United States.

Senator HART. We get to the classification section later.

I have been prodding about 1122.

Senator COOK. But what I am really saying is, regardless of whether you want to get to it later or not, the knowledge you expressly say one has to have under 1122 has been interpreted by the courts as having a classification and nothing more.

Mr. MARONEY. No, that isn't—not under 793 and 794.

May we go back just a moment to 793(d) and the language referred to earlier, the qualifying language, "which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation."

Now, that language refers only to the word "information." It does not refer to the previously used: writings, code books, signal books, sketches, the tangible objects referred to in that section.

Senator HRUSKA. Mr. Maroney, if you will yield, the phrase "information relating to national defense" is defined in Section 1126(g), and it is very broad.

It cites as many as 10 different items that could be considered information relating to defense.

Mr. MARONEY. That is not really a definition. It gives examples of the types of information.

Senator HRUSKA. Well, it is called definitions for sections 1121 through 1125.

Mr. GARNER. The terminology, Senator, says it includes the following categories of information, which are reflections of current law.

The limitations imposed by the *Gorin* case and *Heine* case, that Senator Hart referred to, we had attempted to write in here and make clear, as Mr. Keuch can testify to. We tried as hard as we could to parallel the exact parameters of those cases. We found it exceedingly difficult in light of the major issues involved and we finally decided the safest tack to assure that we paralleled the existing interpretation of that language would be to utilize the term "information relating to the national defense" and have it indicated in the legislative history of this section that it was the intent to incorporate the interpretation of the *Gorin* and *Heine* cases and to have them inure to the defendant charged with disseminating information under 1122 and 1123. If your capable staff is more able than we were to arrive at a satisfactory statutory formulation that reflects the holding in these cases, we would be very happy.

But that was the difficulty we had.

Another bit of confusion, as Mr. Maroney has pointed out, lies in the problem of just what is modified in the current section 793 by the phrase "reason to believe could be used to the injury of the United States." That is only the term "information," itself, which was added to the statute in 1950. Previously, it had no express limitation. The statute without that term and that express limitation refers simply to any "writing," "document," "map," "photograph," and so forth, and so forth, and so forth. As a practical matter, 99 percent of all prosecutions or perhaps more would be under those specific tangible items, as Mr. Maroney pointed out in his testimony—I don't know that there has been a prosecution for dissemination of information which did not specifically refer to those tangible sorts of items—so this language concerning injury to the United States has not come into play in any case yet. Consequently, though there are matters which can be raised under *Gorin* and *Heine* in defense to a prosecution under 793 (d) and (c), they do not arise from the language of the statute itself, but from the interpretation in those cases. That we intended to preserve.

Senator HRUSKA. If the Senator would yield further, may I suggest that in order that the record will be a little easier to consider in this connection that the text of subparagraph (g) of section 1126 be set out verbatim at this point in the record and likewise that section 302, entitled "kinds of culpability defined" be set out as to subsection (b), which deals with the word "knowingly."

I think with that language in the record at this point, we can get the purport of it pretty well.

"§ 1126. DEFINITIONS FOR SECTION 1121 THROUGH 1125

As used in sections 1121 through 1125:

"(a) 'authorized,' when used in relation to the receipt, possession, or control of classified information or information relating to the national

defense, means with authority to have access to, to receive, to possess, or to control such information as a result of the provisions of a statute or executive order, or a regulation or rule thereunder:

"(b) 'classified information' means any information, regardless of its origin, which is marked or designated pursuant to the provisions of a statute or executive order, or a regulation or rule thereunder, as information requiring a specific degree of protection against unauthorized disclosure for reasons of national security;

"(c) 'communicate' means to impart information, to transfer information, or otherwise to make information available by any means, to a person or to the general public;

"(d) 'communications intelligence information' means information:

"(1) regarding any procedures and methods used by the United States or any foreign power in the interception of communications and the obtaining of information from such communications by other than the intended recipients;

"(2) regarding the use, design, construction, maintenance, or repair of a device or apparatus used, or prepared or planned for use, by the United States or a foreign power in the interception of communications and the obtaining of information from such communications by other than the intended recipients; or

"(3) obtained by use of the procedures or methods described in paragraph (1), or by a device or apparatus described in paragraph (2);

"(e) 'cryptographic information' means information:

"(1) regarding the nature, preparation, use or interpretation of a code, cipher, cryptographic system, or any other method of any nature used for the purpose of disguising or concealing the contents or significance or means of communications, whether of the United States or a foreign power;

"(2) regarding the use, design, construction, maintenance, or repair of a device or apparatus used, or prepared or planned for use, for cryptographic purposes, by the United States or a foreign power; or

"(3) obtained by interpreting an original communication by the United States or a foreign power which was in the form of a code or cipher or which was transmitted by means of a cryptographic system or any other method of any nature used for the purpose of disguising or concealing the contents or significance or means of communications;

"(f) 'information' includes any property from which information may be obtained;

"(g) 'information relating to the national defense' includes information, regardless of its origin, relating to:

"(1) the military capability of the United States or of an associate nation;

"(2) military planning or operations of the United States;

"(3) military communications of the United States;

"(4) military installations of the United States;

"(5) military weaponry, weapons development, or weapons research of the United States;

"(6) restricted data as defined in section 11 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2014);

"(7) intelligence of the United States, and information relating to intelligence operations, activities, plans, estimates, analyses, sources, and methods, of the United States;

"(8) communications intelligence information or cryptographic information as defined in subsection (d) or (e);

"(9) the conduct of foreign relations affecting the national defense; or

"(10) in time of war, any other matter involving the security of the United States which might be useful to the enemy;

"(h) 'restricted area' means any area of land, water, air, or space which includes any facility of the United States, or of a contractor or subcontractor with or for the United States, to which access is restricted pursuant to a statute or executive order, or a regulation or rule issued pursuant thereto, for reasons of national defense.

“§ 302. KINDS OF CULPABILITY DEFINED

“The following definitions apply to an offense described in a section of this title and to an offense outside this title which is described in a statute enacted after the effective date of this title.

“(a) **INTENTIONALLY.**—A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

“(b) **KNOWINGLY.**—A person acts knowingly, or with knowledge, with respect to his conduct when he is aware of the nature of his conduct. A person acts knowingly, or with knowledge, with respect to circumstances surrounding his conduct when he is aware or believes that the circumstances exist, or is aware of a high probability of their existence, or intentionally avoids knowledge as to their existence. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware or believes that his conduct is substantially certain to cause the result.

“(c) **RECKLESSLY.**—A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or a result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of conduct that an ordinary person would exercise under all the circumstances.

“(d) **NEGLIGENTLY.**—A person acts negligently, or is negligent, with respect to circumstances surrounding his conduct or a result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all circumstances.

Senator HRUSKA. As to the idea of trying to overcome the superiority of the Department of Justice over the talents of this committee, we will give that a try and see if we can, with your help, overcome the objections of Senator Hart, which I think personally have foundation.

Senator HART. Thank you, Mr. Chairman and thank you for suggesting printing in the record at this point the section you did because I would like to look at the categories of material that are covered by section 1122.

It is information relating to the national defense. It is then defined in section 1126(g). That is the one you had ordered printed.

It includes information relating to military weaponry, weapons development or weapons research in the United States.

Would that, as you in drafting intend, would that include information regarding cost overruns from management mistakes.

Mr. MARONEY. I would not think so.

Senator HART. Conflicts of interest associated with procurement?

Mr. MARONEY. No, sir.

Senator HART. How can you tell that from the statute, the definition?

Mr. MARONEY. Well, I think we have to go back to the test of *Gorin*, whether the information has a reasonable and direct relationship to the national defense, and not just a question of whether or not it concerns some aspect of the military. I think that it has to concern the nation's preparedness to defend itself.

Senator HART. Let me interrupt. I know we are running late and I apologize. It is our responsibility to draft a very sensitive section of the criminal law.

Wouldn't you agree we should at least try to do better than simply leave it to somebody's interpretation of the *Gorin* case?

Mr. MARONEY. Well, as Mr. Gainer indicated, they have made extensive efforts along that line——

Senator HART. It is desirable that we do it?

Mr. MARONEY. I think it would be desirable if a better product can be achieved. It is always desirable.

Senator HART. Specifically a product that will tell the people of the country what it is that will be a criminal action.

Mr. MARONEY. Well, the courts placed a rather extensive judicial gloss, beginning with *Gorin* and *Heine* on similar statutes. We feel if they are sufficient for constitutional purposes, it should also be sufficient in the code as drafted.

But obviously, if it can be done better we are all for it.

Senator HART. We will try.

Now, also included in that definition of information relating to the conduct of foreign relations affecting the national defense, what kind of foreign relations don't affect the national defense?

Mr. MARONEY. Well, I think a State Department expert actually would be better qualified to answer that question.

Senator HART. I would be going to a criminal lawyer to tell me.

Mr. MARONEY. I believe a wide range of matters in the State Department which affect foreign relations also affect national defense.

Senator HART. Does anything occur to you that doesn't conceivably relate to the national defense, effectively?

Senator HRUSKA. Except there is a definition of what that means.

Senator HART. This is what I just read, relating to it.

Mr. MARONEY. Certainly, the conversations between governments involved in the SALT talks, negotiations being——

Senator HART. Those clearly would be, yes indeed.

Mr. MARONEY. Any information, the compromise of which could lead to a break in our diplomatic relations or seriously strain our relations with another country. Those kinds of things are properly classified.

Senator HART. Might it be better if in drafting we could put those examples in illustrating what it is we mean?

Mr. MARONEY. I think the Executive order, for purposes of legislative history, is important to indicate what interpretation the Congress is placing on these provisions. The Executive order does set forth a number of examples of the types of information for each category of classification: top secret, secret, and confidential.

Senator HART. That tells us what the President thinks should be top secret.

Mr. MARONEY. Top secret, secret, the whole gamut.

Senator HART. What we are trying to do is make clear for persons who will be required to obey this law what is meant by "relating to the national defense and the conduct of foreign affairs."

You have indicated some examples as to what was intended to be included.

Mr. MARONEY. And I think the Executive order gives other examples. They are not all inclusive. I think many times these things depend on the peculiar facts existing at the time in connection with the information.

Senator HART. We promised to move on to that classification section. So let me say that I—I apologize.

Mr. MARONEY. The *Heine* case—which is one of the landmark cases that we would like to have in the legislative background of this bill—the *Heine* case requires that the Government has made a conscious determination to restrict the dissemination of information if it is to meet the test of the espionage laws, so that the Executive order is about the only method against which you can place the question of whether or not and to what extent the executive has made an effort to restrict the information.

Senator HART. What we are really attempting to resolve is a question of whether there would be any categories of defense and foreign relations information left that a Government employee could discuss with persons outside the Government.

We want to go beyond—we all agree, press releases and speeches and official reports.

We crowd pretty close to just that if we leave unsure the reach of the statute that we are talking about.

Mr. MARONEY. The Executive order agrees with you 100 percent on that, Senator, and doesn't purport to require classification except with respect to a very small percentage of governmental information.

Senator HART. Until my next question, we still are not talking about the classified matter. We are talking about this other disclosure and the broader definition.

Well, on the classified information, that is section 1124, which makes it a felony for anyone in authorized possession of classified information to disclose it to any person unauthorized to receive it.

Now, I have suggested that the provision cover disclosure with intent to harm our national security—disclosure which is actually harmful that a person has reasonable grounds to believe would be harmful—should suffice to protect legitimate security.

We have discussed it. In drafting your bill, the Department feels it needs broader provisions protecting any defense communication information.

But whichever way we go on that issue, whichever way you come out, if there are provisions in the law which prohibit disclosure of information either under your approach or the one I am trying to develop, why would we also need the additional provision like section 1124, which makes a disclosure of classified information criminal without regard either to the state of mind of the accused or of the content and the nature of the information?

Let us forget for a minute the *Scarbeck* case. Why do we need it?

Mr. MARONEY. Because very often when there is an unauthorized disclosure of properly classified information, the Government must make a judgment as to whether or not, in pursuing the prosecution, it is prepared and should, in the national interest, adduce evidence at the trial to demonstrate why the information does in fact relate to the national defense.

In other words, we should not always—particularly where it is with respect to a Government employee who has been given a trust to preserve and safeguard classified information—we should not always have to reveal on the public record the very information which the classification laws are designed to protect.

Now, we do have to make that choice under the other provisions. Senator HART. Under which?

Mr. MARONEY. Under the other provisions: 1121, 1122, or 1123. If we were prosecuting a private citizen, newspaper reporter, or anyone else under one of these provisions we do have to prove why the information related to the national defense and what the information was.

We don't feel that we should have to do that always in the case of a Government employee or other authorized holder who has a special trust and responsibility to handle the information in a certain way prescribed by the Executive order.

Senator HART. We get to that eventual question of why we should criminalize disclosure of information that shouldn't have been classified in the first instance?

Mr. MARONEY. Well, of course, we are not trying to protect information which shouldn't have been classified.

As I indicated earlier, the Executive order, I believe, builds in a remedy to eliminate such probabilities, and it seems to me that the appropriate way to proceed by a Government employee who has a responsibility to handle classified information, if he disagrees, is to use that remedy. He can go to his superiors and he can eventually, in his department, go to the Department Review Committee, which is made up of people on a departmentwide basis, high level officials. If they turn him down, he can go to the interagency committee, which is a high-level body made up from the broad spectrum of Government agencies, and he can tell his case to them.

If it is a case in which somebody is only trying to cover up their stupidity or cover up graft, it is hard for me to believe that this Government-wide agency is going to disagree with him and say, "No, we will keep the classification secret within the meaning of the Executive order."

Senator HART. You say he has that remedy, but so would you have a remedy without needing the criminal sanction if some fellow ran around town blowing whistles on documents that were improperly classified.

Do you need a criminal sanction? The agency head or the President has ample power to discipline him or even fire him.

Mr. MARONEY. There is room for that remedy today. We think that there ought to be a criminal sanction for a violation of this kind of trust by the person authorized to have access to this sensitive information.

Senator HRUSKA. Would the Senator yield long enough for the Chair to make an announcement?

We will proceed for a while yet with this witness. If we finish, then fine. If not, we will resume our session here at 2 o'clock or as early after the scheduled 1:30 vote in the Chamber as possible, to go on until about a quarter to 4.

Senator HART. If the accused doesn't have the defense of improper classification—

Mr. MARONEY. Under 1124 only?

Senator HART [continuing]. wouldn't that permit Government officials to classify material in order to hide any information he seeks

to keep from the public, not harmful to our security; might indeed be a benefit?

Now, that is the kind of power that I sense is vested in an agency in the approach that you take.

Mr. MARONEY. Well, that statute certainly would not aid the Government official to do something—

Senator HARR. You talk about the review procedure, but the kind of improper classification that has the highest sensitivity and importance and generates the greatest political confidence, it would include the two examples I raised, cost overruns, improprieties in contract awards.

Here again, we cannot forget our own experiences. It doesn't make any difference whether the administration is Democratic or Republican, they are reviewing themselves.

I don't care whether they have 20 fellows there or one White House counsel, they are reviewing themselves.

Mr. MARONEY. In the first instance, it is a particular department reviewing what was done in a part of the department.

In the ultimate appeal to the interagency committee it is representatives from a number of departments, and remember, they are supposed to be applying—they are taking an oath of office also. They are supposed to be applying the standards laid down by the President in the Executive order as to what can be properly classified and what classification it should carry.

Gentlemen, I just don't believe—

Senator HARR. Let me ask, and this is an idea that was suggested in the Harvard Law Review—oh, I am wrong, it was a communication to this committee from a professor named Heyman at Harvard, who served as a legal counsel in the State Department.

He suggested at least we provide a defense under this disclosure of classified information if the information had been classified primarily for the purpose of protecting officials from embarrassment. Would you agree with that? Why not put that in?

Mr. MARONEY. As a practical matter, Senator, I think you do have that kind of a buffer.

If you have a situation like that and there is a disclosure of a document which has been stamped secret, and it is completely wrongfully so stamped, and it only covers up corruption or something, you have the prosecutor in the case who has to make a prosecutorial judgment as to whether or not the indictment should be sought, and I think—

Senator HARR. Why don't we provide for it in the statute?

Mr. MARONEY. Because then you build in—

Senator HARR. From the embarrassment and corruption.

Mr. MARONEY. Then you build in a test which defeats the whole purpose of the statute; you build in a defense based on the nature of the document and the Government at the trial has to disclose what the information was.

If you provide that kind of a test, you may as well eliminate 1124 and ride with 1122 and 1123.

Senator HARR. Aren't you downgrading the court's credibility?

I am not an experienced fellow in in-camera procedure, but I have sat through some law school lectures describing them, and I read about them once in a while.

Isn't there a way to permit this kind of defense to be made and not unveil everything and even if you don't unveil everything; might it not be better to expose the corruption?

Mr. MARONEY. I don't know if you could constitutionally build in a defense to be determined by in-camera inspection, solely by the judge.

The rationale behind this is, as I see it, that a Government employee—I say Government employee but it could cover other people in authorized possession of classified information—in that capacity is given a trust under the provisions of the Executive order to safeguard the information as to which an official knowledgeable in the facts has made a judgment that it should be entitled to protection within the standards of the Executive order. That employee should not be free on his own, and perhaps oftentimes without all the factors that went into the judgment to classify, to abort that process by making an independent disclosure without the possibility of a criminal sanction.

If he has a legitimate point to make, I submit that he can follow the processes that are permitted to him. I also submit that he can get a fair determination of whatever complaint he may have. Maybe he could assume that once in a thousand situations he would not get redress.

Senator HART. I think Senator Cook addressed himself to this earlier.

Senator COOK. What bothers me about this, Senator, is that he really has this kind of opportunity to appeal.

The Executive order doesn't really refer to the individual who finds himself in that kind of a position.

It refers to the individual who classifies. It refers to the individual who wishes to declassify something within the framework of his own department, but this appeal that you have continued to talk about I don't really get out of reading 11652.

The thing that bothers me that Senator Hart has raised—let's turn to page 2 of the Executive order relative to the phrase "confidential."

It says in there the test for assigning confidential classification shall be whether its unauthorized disclosure could be reasonably expected to cause damage to the national security.

Why isn't that same test applied to a man who is accused of having distributed information that is marked confidential?

If that is the test that applies to literally hundreds of people in the Government who summarily put confidential on something, why isn't that same test applied to an individual?

You see, you keep saying to me, because this individual is in a position of trust and the trust says he must apply that principle because all he has to do is see the word "confidential."

Why can't you apply that same rule to the man who is accused of distributing something marked "confidential" which would not fall within the test of whether it is unauthorized disclosure and would reasonably expect it to cause damage to the national security?

Mr. MARONEY. The purpose of 1124 is to try to obviate the necessity of disclosing the information, which the Government feels is entitled to protection in the interest of national defense, in order to

sustain a prosecution where it involves a Government employee or someone having breached his trust.

Now, in the other provisions—

Senator Cook. I get in the *Scarbeck* case—again, I go back to this—here is a guy who received three 10-year sentences and neither the prosecutor nor the judge or anybody looked at the three particular items the Ambassador marked “confidential.”

However, the Polish Government has that material. That is what they were marked to protect from, and yet we can't make a determination whether Mr. Scarbeck really gave away information which involved the security of the United States.

Mr. MARONEY. Because under the particular statute there was no requirement the Government make that disclosure in that case.

Senator Cook. That is what I am talking about.

We would have been in a hell of a shape if there had been nothing in the envelope and yet it was marked “top secret.”

Mr. MARONEY. If it is simply an envelope?

Senator Cook. How do we know?

I mean look, I have to tell you, because the prosecutor doesn't get it, the judge doesn't get it, the jury doesn't get it—

Mr. MARONEY. In that case, and under this provision, an official who classified the information would have to testify that this particular document was classified by him as secret or confidential pursuant to the Executive order, and testify concerning his conclusion as to why it was entitled to protection under the Executive order. So if it was an empty envelope with a secret stamp on the outside nobody would be in a position to so testify.

Senator Cook. I can't read in the *Scarbeck* case that the Ambassador testified—

Mr. MARONEY. Ambassador Beam did testify.

Senator Cook. It merely says the Ambassador had the right under this authority because the Department of State listed that he had the right to classify.

Mr. MARONEY. Under this provision we certainly have to show it is classified information under the conditions of the statute.

Senator Cook. The point of his testimony really doesn't mean that it is so.

Mr. MARONEY. It doesn't mean that he was right; that is right. It doesn't.

Senator Cook. It happens that the guy is spending 30 years in prison and we don't know whether it is right or not. That is what I mean in the interpretation of how we write these things.

Senator HRUSKA. Would the Senator yield?

Senator Cook. Yes.

Senator HRUSKA. Isn't that something the employee knows? He can read well enough to identify the word “confidential,” or “secret,” or “top secret.”

One of his official duties is to abide by that. He doesn't have to spend 30 years in jail unless he willfully and knowingly hands that to somebody not entitled to receive it.

Mr. MARONEY. That is right.

Senator HRUSKA. He doesn't have to go.

Senator Cook. Except we have found for instance in the files of Government things that have been classified as confidential, which are newspaper articles out of newspapers in daily circulation.

Now, they are in an envelope and he has no knowledge of what is in it except it is confidential and it deals with a particular department and they want any confidential information they can get out of the department, and he turns that over to a foreign power, and it was a newspaper article that appeared in the New York Times and Washington Post.

The thing I am saying is that the court does not look behind what is in that envelope.

Senator HRUSKA. That is right.

Mr. MARONEY. That is right.

Senator HRUSKA. He knows enough to read confidential; he knows it is against the law; it is his sacred trust and obligation not to do it. To allow him to give it to a person knowing it is classified will destroy the whole system, and that is the basis for the *Scarbeck* case. It says you don't engage in a classification system which can be negated.

There is no problem. That man can respond to a congressional committee. If he has any doubts about whether the classification is silly or otherwise improper, he can take it to a review committee. There is no problem for the further reason that there are definite standards and guidelines in this Executive order that is not even a year old yet, and under which tremendous progress has been made. They are guidelines and standards which are to be followed. A newspaper article would not qualify for classification.

There are penalties against a man who classifies a newspaper ad or story or any other improper classification.

Now then, do you want a system of classification or don't you?

If you don't want it, let the man with impunity say, "well, it is true I gave this recipe for certain kinds of explosive. It is marked 'top secret,' and I want you to prove that it is proper classification." Now, they will have to go into the whole subject in open court of giving the foundation, the history, and the related matters to making this particular formula for this explosive which has been properly classified.

There are as many safeguards as can be devised in the present Executive order.

I suggest before we continue with that sort of approach to it, that we read the report of the Interagency Review Committee to see what has been done and what is portended for the future in that field.

Senator Cook. May I say this, Mr. Chairman, that I can't really in essence disagree with the case that you give as an exhibit.

I cannot disagree with you on that at all. I have to agree in that kind of a situation and under those types of terms that the severest penalties of the law should certainly apply and I can't argue that point.

But I can't get out of the Executive order what you Gentlemen get out of it, and you are talking about the penalty for someone who classifies.

It says repeated abuse of the classification process shall be grounds for administrative reprimand. I have to tell you I can't

equate that in my mind to the severe penalties that apply in relation to the categories and not apply those same criminal penalties to those who promiscuously classify Government material which should not be classified to that extent and that degree.

If we could know what is classified, without any shadow of a doubt, is within the interest of the country and its national defense, then I agree with what you are saying.

But the point I am making is that even with the review board, this review board consists of members of the Department who have the right to classify; so therefore, again what you are doing is interpreting your own rights to classify.

For instance, it says in here before this shall go into effect each department of the Government shall set forth its rules and regulations relative to how it will classify.

I assume the Department of Justice has submitted to the Review Committee its rules and regulations, its commissions by which it shall classify?

Mr. MARONEY. That is right.

Senator COOK. Are those available to the committee?

Mr. MARONEY. Yes.

Senator COOK. May we have a copy of them?

Mr. MARONEY. Yes.

Senator COOK. So that we can see what you consider to be within the classificatory designations of those three top classifications.

Mr. MARONEY. The designation itself admits what is includable.

Senator COOK. I think it would be helpful to see those.

Mr. MARONEY. Might I also point out, Senator, you raised the question earlier, you didn't read in the Executive order as we do this appeal procedure that is available to an employer or anybody.

Senator COOK. Give me the number.

Mr. MARONEY. Section 7(a) (2) in the Execution order and (b) (1) and (2) under section 7, as well as section 13.

Senator COOK. Wait a minute, it says an administrative and judicial officer of the United States who unnecessarily classifies.

This isn't the gentlemen who distribute. This is the gentleman who unnecessarily classifies something.

Mr. MARONEY. Our point is, he should go that route, he should take administrative action available.

Senator COOK. Before he makes distribution of what is top secret secret or confidential?

Mr. MARONEY. Yes.

Senator COOK. What I am saying is that may well be right, but that is available to him after the fact when we talk about the distribution of secret or top secret or confidential.

Senator HRUSKA. It is not available under the provisions of present law and the Supreme Court said so.

Senator HART. I just have three more questions.

When we began, we suggested that this difficult balancing business between the claims of the first amendment and the obligation to protect the country's security, ultimately the resolution of those claims should be in the hands of the court.

Ultimately, it is your feeling or the Department's feeling that the courts can't resolve this classification issue in the narrow sense I have described.

Mr. MARONEY. We are already at that point with respect to existing statutes. Senator.

Senator HART. I know, we are talking about what we can do that is better.

Mr. MARONEY. From a constitutional standpoint, the courts have sanctioned it.

Senator HART. The Supreme Court hasn't.

Mr. MARONEY. Certiorari was denied.

Senator HART. What does that mean?

Mr. MARONEY. It means the Court refused to review the Court of Appeals.

Senator HART. But this has no bearing on the merits.

Mr. MARONEY. It is not an affirmance by the Supreme Court—

Senator HART. But in any event, on the question of whether the courts can in certain of these cases continue to be the ultimate course for resolving the complaint, isn't it true that in the Pentagon papers case there were in camera proceedings both in the District and the Appellate Court?

Mr. MARONEY. In the civil cases, yes, sir, not in the criminal case now going on involving that subject matter.

Senator HRUSKA. The question there was not under the equivalent of section 1124, but under sections 1121 and 1123.

Mr. MARONEY. On the question of in camera proceedings, I thought—

Senator HART. On the question the court could proceed in a fashion that would not disclose the ultimate secret and yet enable it to determine whether the accused—the defendant—

Mr. MARONEY. Also, I have just been reminded, in the closed hearings that were held in the District Court in the *Washington Post* case, that was not really an in-camera review by the court. Witnesses were present, the defendants in the civil action were present, and their counsel and expert assistants were present. So that it wasn't what we refer to as an in-camera proceeding which means that the judge reviews in chambers information submitted for a determination.

Senator HART. Was it in-camera in the sense I couldn't walk in, but some did walk in?

It was confidential but not literally traditional in-camera?

Mr. MARONEY. It was closed generally, but it was not closed to the parties to the action and their counsel.

Senator HART. I promised there were just three questions.

First, subsection (b) of section 1124 exempts from prosecution the fellow who gets classified information as a conspirator, accomplice.

As I understand this, a newspaper man who receives classified information under this section could not be proceeded against for the receipt of that document?

Mr. MARONEY. That is right, sir.

Senator HART. What is the purpose of this?

Mr. MARONEY. The purpose is to narrow the category of individuals who are subject to the criminal sanction.

Senator HART. Would not the reporter or his editor or publisher still be involved in the commission of a felony under section 1123, if

he retained that information without reporting the leakage of it to the officials?

Mr. MARONEY. If the information did in fact relate to the national defense, he might be liable for failing to return it as he would be under present law.

Senator HRUSKA. But not under 1124?

Mr. MARONEY. Not under 1124.

Senator HRUSKA. And that has been the law for 25 or 50 years?

Mr. MARONEY. At least since 1917.

Senator HART. You don't classify something that isn't related?

Mr. MARONEY. You are not supposed to, Senator, though maybe somebody will make a mistake or maybe somebody will exercise bad judgment.

Senator HART. I am taking the hard core case.

Mr. MARONEY. If the Executive order is followed in fact in every case under 1124, the Government would be in a position to prove in a prosecution under sections 1121, 1122, and 1123 that the information did in fact relate to the national defense. But the problem is that we would have to make the disclosure in order to satisfy the requirements of the prosecution.

Senator HART. There is a concession to the media involved in this section, but not very much, because I didn't mention that under 1122 in the situation I have described if the material was related to national defense and they communicated it to others, they would be stuck under 1122, too.

Mr. MARONEY. That is right, but any prosecution, of course, would have to carry that burden and make the disclosure. That is consonant with existing law.

Senator HART. If he was proceeded against under 1124, that is, if a proceeding was undertaken under 1124, would this individual have to disclose the sources, because he can be prosecuted under 1122?

Mr. MARONEY. That would be a separate question as to whether or not—

Senator HART. But I ask it.

Mr. MARONEY. You mean if you subpoenaed a reporter and interrogated him concerning his source? He would be in exactly the same position he is in today. If he had a Fifth Amendment claim he could invoke it. 1124 doesn't put him in any different position than he is today.

Senator HART. Mr. Chairman, thank you.

I apologize.

Senator HRUSKA. Before Senator Cook starts his questions, it has been suggested that there is a concession in 1122 and 1123 to the media but not very much.

That is a state or condition that has prevailed for a long time; hasn't it?

It wasn't created by the Brown Commission or Senator McClellan or the Judiciary Committee or the Administration bill that was prepared in your Department. That has been the law since 1917. If it is a matter of saying we will junk that, that is a different ball game.

As against the first duty of a nation to try to survive, you have a frontal collision, and there is where we have to make our decision.

Mr. MARONEY. That is right, and there is where the Government is put to its burden of proof.

Senator HRUSKA. Senator Cook, you are a patient man.

Senator COOK. I have already asked my questions. Thank you very much.

Senator HRUSKA. Thank all three of you for being here.

Please furnish, if you will, copies of the memoranda for the committee and the staff.

If we need your further presence, we will let you know.

Thanks for coming.

It was an excellent statement.

We will recess now until about 2:15, because the vote that has been scheduled for 1:30 is now scheduled for 2 o'clock.

[Whereupon, at 12:50, a luncheon recess was taken.]

AFTERNOON SESSION

Senator HRUSKA. The subcommittee will come to order.

Mr. Landau, who has filed a statement with the Committee, will proceed to testify.

Mr. Landau.

STATEMENT OF JACK C. LANDAU, NEWS REPORTER WITH NEWHOUSE NEWSPAPERS

Mr. LANDAU. Thank you very much, Senator.

Unfortunately, the other gentlemen who were going to accompany me this morning, Robert Maynard and Robert Jordan, both were called away this afternoon, Mr. Jordan on a legal problem. He will try to get back.

And Mr. Maynard had a column that he had a deadline for, so I am sorry we aren't able to give you the kind of assistance we had wanted to give you.

Senator HRUSKA. Would either of them like to submit a written statement for the record?

Mr. LANDAU. I think they would.

Senator HRUSKA. That will be done and they will be incorporated, along with your statement, into the record at this point.

STATEMENT BY JACK C. LANDAU, AND ROBERT C. MAYNARD; ACCOMPANIED BY
ROBERT JORDAN, ESQ., REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

INTRODUCTION

My name is Jack C. Landau. I am a working news reporter employed as the Supreme Court correspondent of *The Newhouse Newspapers*. I am accompanied by Robert C. Maynard, Associate Editor of *The Washington Post*, and Robert Jordan, formerly general counsel of the Department of the Army and now an attorney with the firm of Steptoe and Johnson. I am a member of the Bar of the State of New York. Mr. Maynard and I are here today as individual reporters in our capacities as members of the Executive Committee of The Reporters Committee for Freedom of the Press. Mr. Jordan is a member of the Bar of the District of Columbia and is counsel to our Committee on a pro bono basis on First Amendment problems.

We are prepared to testify on certain freedom of information features of three different proposals to reform the Federal Criminal Code—S.1 introduced by Senator McClellan, S.1400 drafted by the Administration and introduced by

Senators McClellan and Hruska, and the *Brown Commission Code* drafted by the National Committee on Reform of the Federal Criminal Laws.

The Reporters Committee is the only legal defense and research fund organization in the nation exclusively devoted to protecting the First Amendment and freedom-of-information interests of the working press.

The organizational premise of the Committee is that the constitutional interests of the working press may be different from the interests of media owners or other groups with an interest in preserving First Amendment rights.

The Committee was formed at an open meeting at Georgetown University in March, 1970, in response to the threat posed by the Justice Department's subpoena policies. It has been funded by personal donations from Steering Committee members and by modest foundation grants.

On behalf of The Reporters Committee and of the working press as a class whom our Committee represents in court and in other ways, we are grateful for your invitation to testify before this Congress on a subject which is of critical importance to the nation.

Because we have faith that the Congress wishes to protect and encourage First Amendment guarantees, we believe that Congress should strongly oppose the new press censorship principles incorporated in the Administration bill.

Quite simply, the Administration is attempting, in its new Criminal Code, to severely restrict the ability of the public to learn about government policy making decisions and government reports by establishing three completely new crimes which would make any news reporter automatically liable to criminal prosecutions for "receiving stolen property", "theft", and "fraud" against the government for merely possessing or publishing the contents of any government report—delivered to him verbally or in writing—if the government information was obtained without the official authorization of the executive branch. Under the Administration's proposals, the report could be anything from a highly classified document to a Bureau of Indian Affairs report to an internal Department of Justice memo on pay-offs in the Watergate case.

To be able to seek these criminal sanctions against the press, the Administration has developed the pernicious theory arguing, for the first time, that the government owns government information.

What this means is, under the Administration proposal, the only time a reporter would be legally free from the threat of prosecution to publish government information is if the information came to him by government hand-out—precisely the type of censorship system which the First Amendment was designed to eliminate. We believe that S.1 is equally offensive because it, too, permits prosecution of a news reporter for "theft" and "receiving stolen property" for possession or publication of government reports.

At this point, we do oppose the proposed Federal Criminal Code submitted by the National Commission on Reform of Federal Criminal Laws on the theft question. The theft sections, 1731, 1732, et. seq. do not appear to be clearly applicable to news reporters, although we would hope that this Subcommittee would attempt to clarify that question during these hearings.

As if this is not enough to dissuade the press from attempting to inform the public about the policy decisions of the government, the Administration has added two new laws which would make it a crime for a reporter to disclose "national defense" information regardless of whether the information would pose any "clear and present danger" to the national security of the nation.

The Brown Commission and S.1 also contain similar blanket criminal prosecution threats for the release of national defense information. Under all three proposals the reporters involved in publishing the Pentagon Papers would appear to be clearly open to criminal prosecution.

S. 1400 CRIMINAL CODE REFORM ACT OF 1973

It is abundantly clear that the Administration has drawn its bill to silence, through the use of the criminal laws, the type of reporting involved in the Pentagon Papers, the My Lai Massacre, the Watergate affair, and other examples of aggressive news reporting, embarrassing to the government, which has depended, in whole or in part, on government compiled information and reports obtained by the media without authorization. The Bill states:

"Theft".—"A person is guilty of an offense if he knowingly takes or exercises unauthorized control over or makes an unauthorized use, disposition or transfer of . . . property of another."

"* * * There is federal jurisdiction over an offense described in this section if * * * the property is owned by, or is under the care, custody or control of the United States or is being produced, manufactured, constructed or stored for the United States."

"Property" is defined as including "intellectual property and information."

"Section 1732—Receiving Stolen Property".—"A person is guilty of an offense if he receives . . . (stolen) property."

"Section 1742—Unauthorized Use of a Writing".—"A person is guilty of an offense if with intent to . . . harm a government * * * he knowingly possesses a writing which has been issued without authority."

"Section 1301—Obstructing a Government Function by Fraud".—"A person is guilty of an offense if he intentionally obstructs, impairs or perverts a government function by defrauding the government in any manner."

Prior to 1970 it would have been difficult to accuse the Administration of intending, for the first time, to apply "theft", "receiving stolen property" and "fraud" penalties against a newsman for merely receiving government information. But, unfortunately, we now have what we believe is overwhelming evidence of the Administration's intent to prosecute the news media for obtaining unauthorized government reports. This novel legal censorship assault conflicts sharply with both American constitutional tradition—that the government reports belong to the public—and specifically with the incorporation of these constitutional principles in the 1909 Copyright Act.

Until 1970, to the best of our knowledge, no one had ever suggested that a newsman could be prosecuted for "theft", "receiving stolen property" or "fraud" for publishing a government report. Then, during the oral arguments before the United States Court of Appeals for the District of Columbia in the case of *U.S. v. Washington Post* (The Pentagon Papers) the Solicitor General made the remarkable statement that the government's ownership rights in the Pentagon Papers were similar to the ownership rights of Mrs. Hemingway in an Ernest Hemingway manuscript—that is to say that the Justice Department put forth the pernicious doctrine that the executive branch has a common law proprietary interest (or common law copyright) in government reports.

Mr. Griswold repeated this argument in a somewhat more modest form in the Supreme Court. Fortunately, neither court was responsive to the Justice Department's claim.

But the government did not give up. In March, 1971, it indicted Anthony Russo and Daniel Ellsberg on charges of conspiring to receive stolen government property—"studies, reports, memoranda and communications which were things of value to the United States of a value in excess of \$100." In addition, the indictment accuses the defendants of an equally novel crime—"to defraud the United States * * * by impairing, obstructing and defeating its lawful government function of controlling the dissemination of * * * government studies, reports, memoranda and communications."

Thus, those news reporters who, for *The New York Times*, *The Washington Post*, *The Boston Globe* and *The St. Louis Post-Dispatch*, obtained the Pentagon Papers are, under the government's theory in the Ellsberg case, subject to prosecution for "receiving stolen property", "theft" and "fraud".

The government's trial brief states its position succinctly: "Both the documents and their content are the property of the United States and remain its property until they are * * * released by the government. The content of such * * * documents is itself government property quite apart from the government's ownership of the sheets of paper on which it is reported."

The government trial brief adds: "To be convicted of stolen property it need only be shown that the defendant obtained possession of or some measure of control over the property * * *"

However, the Justice Department realized that there was a conceptual problem with attempting to classify as government property the facts about government decision making contained in reports paid for by and of interest to the public. Therefore, it has added in S. 1400 a new definition of government property to clearly cover government reports by including as government property: "intellectual property and information by whatever means preserved." It also eliminated from the receiving stolen property statute any "intent" and it has eliminated any requirement that the government information have any monetary value because, of course, it is questionable whether a government

report—owned by the public and not subject to copyright—can have any monetary value.

Our view of the Justice Department's intent to prosecute newsmen for receiving unauthorized government information has been confirmed in a remarkable interview conducted by Morton Kondracke, a reporter for *The Chicago Sun-Times*, with Ronald L. Gainer, deputy chief of legislation for the Justice Department and the chief draftsman for this section. We would like to submit Mr. Kondracke's stories for the record.

According to Mr. Kondracke's story, the Justice Department proposal would even subject a newsman to a "receiving stolen property" prosecution if he, without authorization, obtained facts from a government report verbatim over the telephone.

The only federal attempt so far to prosecute a newsman for receiving unauthorized government facts has been the arrest of Mr. Leslie Whitten of the Jack Anderson Column for his receipt and possession of several boxes of reports compiled by the Bureau of Indian Affairs. There was no allegation by the government that Mr. Whitten participated in the break-in, but only that he possessed the reports. The government declined to seek an indictment and the case was dropped.

The Justice Department is, unfortunately, not alone in wishing to inform the public through information by government hand-out only. The State of California has already adopted the Justice Department approach, and we fear that other states may attempt to do this in the future.

Like the Justice Department, California has recently claimed that a news reporter and an editor can be convicted for receiving stolen government property when the property consisted of a photographic copy of a list of state civil service employees acting as undercover narcotics agents. The editor, Arthur Glick Kunkin of *The Los Angeles Free Press*, and the reporter, Gerlad R. Applebaum, were convicted, and the conviction was upheld by the appellate division of California.

The Reporters Committee submitted a brief *amicus curiae* in this case on certiorari to the Supreme Court of California. We will submit a copy of this brief for the record and, with your permission, I would like to call your attention to one section of our brief which states: "This republic is founded on the principle of an aggressive and probing press, not on the principle of information by self-serving and frequently deceptive government handouts. Public information belongs to the public. It does not belong to the Defense Department or the President. And it does not belong to the Attorney General or the Governor of California."

S.1.—S.1 is equally objectionable. It makes it a crime to receive stolen property and defines property as "any government file, record, document or other government paper" taken without authorization from any government office or any government servant.

S.1 does not attempt to extend criminal fraud penalties to the press for obtaining unauthorized government information by obstruction of government process.

S.1 appears to limit its coverage of obstruction to "physical obstruction", although we would appreciate a legislative history confirming our reading of this section.

The Brown Commission Report does appear to extend the existing law in the areas of "theft" and "receiving stolen property" to cover the press (Section 1732). Like S.1 the proposal would include any "government file, record, document, or other government paper." Like both S.1 and S.1400, the Brown Commission Report eliminates any requirement that the government record have a monetary value. The Justice Department, under its current view, could probably use Section 1301—"Obstruction of Government Function"—against the unauthorized publication of government reports.

Position of The Reporters Committee for Freedom of the Press.—It is the position of The Reporters Committee that news reporters and news organizations must be free from any civil or criminal penalties stemming from the possession or publication of any government information except, perhaps, in the narrow area of information which clearly would pose a "direct, immediate and irreparable injury" to the national security.

For all practical purposes this appears to be the standard agreed to by at least five of the Supreme Court Justices in the Pentagon papers litigation.

It should be clear that the passive receipt of government reports and their publication by the news media in the public interest must not be subject to the blanket threat of criminal prosecution merely because the government does not want the public to know what the report contains. This is prior restraint in its most ancient form—an ability to criminally punish publication *regardless of content and regardless of the effect* of publication upon the welfare of the nation.

In fact, the use of a blanket criminal penalty to stop publication of news—*regardless of the content*—uses the original prior restraint tool of the British Monarchy which used the criminal libel laws to punish publication of any information which displeased the king.

We have always permitted criminal and civil penalties stemming from the effect of the published information—such as the criminal obscenity or civil libel laws—but never for the publication itself. (Cf. *Near v. Minnesota* 283 U.S. 697) If then the press can only publish what the government says it can publish, the press ceases to be an independent institution operating for the benefit of the public and is converted into a government propaganda tool supinely accepting without question the information which the government decides it may publish.

We start then with the premise that the Congress shall make no law abridging the freedom of the press. We should also like to remind the Committee that Congress was specifically ordered in Article I—not just to be neutral—but to actively encourage the free flow of information and ideas to the public: “To promote the Progress of * * * useful Arts, by securing for * * * Authors * * * the exclusive Right to their respective Writings * * *” (Article I, Section 8).

Furthermore, we have always believed that the freedom of the press guarantee includes a penumbra of constitutional rights, including the right of a news reporter to freely associate and receive information from all segments of the population, including government employees (Cf. *N.A.A.C.P. v. Button*, 371 U.S. 415).

There are dozens of important cases which uphold the doctrine that the government can have no proprietary ownership interests in government reports, Cf. *Public Affairs Press v. Rickover*, 284 F.2d 262; *Pearson v. Dodd*, 410 F.2d 701; *First Trust of St. Paul v. Minnesota Historical Society*, 146 F. Supp. 652. In addition, there is the strong line of cases defending the public's right to be informed of news. This is a right, even more important than the personal right of a public official to be protected from defamation—certainly a more ancient and strongly rooted right than the right of the government to own information (Cf. *New York Times v. Sullivan*, 376 U.S. 254; *Associated Press v. Walker*, 388 U.S. 130; *Rosenbloom v. Metromedia Inc.* 403 U.S. 29).

Then, there is the specific right to republish government information contained in the 1909 Copyright Act, 17 U.S.C. Sec. 1 et seq. which provides: “No copyright shall subsist in any publication of the United States government, or any reprint in whole or in part thereof.”

We respectfully suggest that the Department of Justice bill—permitting a criminal prosecution against a newsman for republication of a government document based on a claim of government ownership—would completely void the 1909 Copyright Act. Certainly the freedom which the Copyright Act gives the press to republish government information is a meaningless right if a newspaper can be criminally prosecuted for exercising its republication rights under the Copyright Act. In fact, the Justice Department is attempting to impose on our society the press licensing and Crown Copyright laws of Great Britain, the very evil which the First Amendment was written to eliminate. Against the Constitution, the case law and the statutes, what does the Justice Department offer as its justification? *Hass v. Hinkle*, 216 U.S. 462, a 1910 case in which three cotton speculators were accused of bribing a Department of Agriculture employee in order to obtain advance information of cotton futures and also to have false cotton future information given out to defraud the general public.

We note that the Court severely limited the *Hass* case in the unanimous opinion by Chief Justice Taft in *Hammerschmidt v. U.S.*, 265 U.S. 182, in 1924, in which he said that fraud against the government could certainly be used to prosecute non-government employees who use false government reports in a conspiracy involving “trickery . . . bribery of an official, deceit and false pretenses.” The government has chosen to ignore Chief Justice Taft and to rely mainly on the *Hass* opinion bolstered by *Dennis v. U.S.*, 384 U.S. 855, in 1966. But here again, the *Dennis* case involved the filing with the government of

false information in order to obtain free government services, very much as if one filed a false credit report to obtain a government loan.

It seems clear that the Justice Department is attempting a grotesque interpretation of two Supreme Court cases in order to cut off from the public all unauthorized government information by analogizing good faith reporting of government studies and reports with a couple of cotton profiteers in 1910 and a labor racketeer in 1966.

NATIONAL SECURITY

Having already subjected the press to the blanket threat of automatic criminal prosecution for receiving stolen property and fraud for publication of any government report regardless of its content, the Justice Department added an additional legal thumb-screw by again asking Congress to change current law and to subject the press to automatic criminal prosecution for "espionage" and "disclosing national defense information" for the publication of virtually any government report involving "national defense".

The existing espionage statute (18 U.S.C. 793) only makes it a crime to obtain "defense" information "with intent or reason to believe that the information is to be used to the injury of the United States or to the advantage of any foreign nation." Furthermore, Sections 793 and 794 both specifically in the statute and by court interpretation have been aimed at conventional saboteurs interested in "a sketch, photograph, blueprint, map, model, instrument * * * writing or note."

Thus the existing law requires a clear "intent" to substantially harm the national security.

This, of course, was the great stumbling block for the Administration in the Pentagon Papers. The Administration proposal clearly attempts to rewrite the existing espionage statute and the Pentagon Papers decision by making it a crime for a news reporter to "knowingly communicate information relating to the national defense" (Sec. 1122).

Section 1121, the proposed espionage section, permits a newsman to be prosecuted if the "national defense" information "may be used to the prejudice * * * of interests of the United States."

The standard here is extremely vague. How is a newsman to guess what may or may not "be used to the prejudice" of the United States?

The definition of "national defense information" includes virtually any type of reporting involving foreign affairs because it encompasses information on the "military capability of the United States or of an associate nation", "military planning or operations", "information relating to intelligence operations, activities, plans, estimates, analysis, sources and methods", and "the conduct of foreign relations affecting the national defense".

It would be easier to ask, under the Administration proposal, what information regarding foreign affairs would not subject a newsman to a criminal prosecution.

Senator McClellan's bill is only slightly less restrictive. S.1 does not extend the current espionage laws, but the bill does contain Section 2-5B8—"Misuse of National Defense Information", which would permit prosecution of a newsman for publication of "national defense information". As in the Administration bill, "national defense information" does cover "intelligence operations, activities, plans, estimates, analysis, sources and methods" and all "military defense planning or operations".

The Brown Commission Report does not appear to attempt to extend the espionage laws to the press. However, the Brown Commission would make it a crime for a newsman to publish any "classified communications information". This section could be stretched to cover a broad range of Pentagon and State Department information although it appears to be designed to punish publication of a "code, cipher, or cryptographic system" and other similar information.

We think that the Congress ought to, in every way possible, encourage the press to inform the public about the way its government operates in all areas, whether it be the Department of Health, Education and Welfare, the Department of Justice, or the Departments of State and Defense. Certainly there is a presumption that information which the government withholds is based on a reasonable justification in the public interest.

But once a news reporter obtains information about Watergate, or about Vietnam, or about Thalidomide, then, under our system of laws, the govern-

ment has the burden of providing in a criminal statute that the publication of the information poses a "clear and present danger" to some "overriding and compelling" national interest.

Reporters should not be faced with possible jail terms for publishing any information the government has not released. Reporters should not face jail terms for publishing any "national security information" regardless of its content. In the Pentagon Papers case, Dean Griswold told the United States Court of Appeals that the Constitution did not authorize the courts to "second guess" President Nixon's determination that the publication of the Pentagon Papers would harm the national security. The Supreme Court disagreed. The Justice Department proposal would, in effect, void the Pentagon Papers decision. It would permit the government to criminally punish any reporter for publishing "national defense information" based on the untested and self-serving conclusions of the executive branch. Our Committee cannot believe that the Congress will authorize any such British Official Secrets Act doctrine to be imposed upon the public of our nation.

CONCLUSION

Taken together, the Administration's proposals—for prosecutions of "theft", "fraud", "receiving stolen property", "espionage" and "disclosing national defense information"—would establish new and unprecedented criminal censorship powers against the press for publishing newsworthy government information and would amount to the press licensing criminal libel and Crown Copyright system which the Framers of the Constitution sought to eliminate in the First Amendment.

Senator HRUSKA. You may proceed.

Mr. LANDAU. We have submitted a rather lengthy statement on this question and basically, we have two fundamental objections to the Code.

The first objection goes to the theft, receiving stolen property and obstruction of justice provisions, because these would make news gathering a crime when it involves government reports.

The underlying premise of these three sections of the Code is that the Government has a proprietary ownership interest in government information and that as the owner it can prosecute for theft.

Mr. BLAKEY. Are you suggesting, Mr. Landau, that this is not the case under present law?

Mr. LANDAU. We are suggesting it is definitely not the case under present law.

We are suggesting the doctrine, except for the 1910 case, first reared its head during the arguments of the Pentagon Papers when the Solicitor General suggested the ownership rights in the Pentagon Papers were similar to Mrs. Hemingway's ownership rights in the *Ernest Hemingway* case.

They repeated that argument in the Supreme Court.

Mr. BLAKEY. If in fact it turned out that you were wrong, I take it your objection would be as Senator Hart's was this morning. Your position is independent of what the scope of the present law is?

Mr. LANDAU. The courts have never upheld the Government, at least not recently.

We don't think the courts have ever upheld the Government's novel claim of proprietary ownership of government information.

They are, of course, arguing that in the *Ellsberg* case.

Mr. BLAKEY. If they did, you would still take the same position?

Mr. LANDAU. You mean if the Supreme Court ruled that the Government does have a proprietary ownership in the facts compiled and paid for by the taxpayers?

MR. BLAKEY. Yes.

MR. LANDAU. I guess we would have to maintain that. But since the question——

MR. BLAKEY. You are really arguing the policy question and not the legal question?

MR. LANDAU. We think we are arguing the legal question. We have *Pearson v. Dodd*, the *Lewis and Clark Dairy* case, and the *Admiral Rickover* case to support us. We have on our side the overwhelming weight certainly of the courts of appeals on the question of proprietary ownership, and we think what the Government is attempting to do in this code is to get around the obstacle that is posed by constitutional law and by the 1909 Copyright Act because there doesn't seem to be any question in anybody's mind that if the Government can prosecute criminally for enjoying rights to republish documents, then the 1909 Copyright Act is for all practical purposes void.

MR. BLAKEY. Is your argument limited to newspaper reporters?

Would you make the argument that no person could be convicted or ought to be convicted for receiving stolen property where the person from whom the property stolen was the Government?

MR. LANDAU. I haven't——

MR. BLAKEY. Why would you limit it to newspaper reporters?

MR. LANDAU. I would have to study that. I think the definition we all agree on is persons who are regularly engaged in the dissemination of news.

MR. BLAKEY. Would you include in that category representatives of foreign press?

MR. LANDAU. On the constitutional side of it, I suppose one would say that a resident alien has the same rights under the First Amendment as a citizen does.

MR. BLAKEY. Say a working reporter for the London Times?

MR. LANDAU. On the constitutional question. On the statutory question, I do not know. I do not know the Copyright Act well enough to know whether a foreign alien is precluded from raising a defense in the Copyright Act.

MR. BLAKEY. I am not really quarreling with you so much about the current law.

I take it it is really policy questions you are addressing if you want to exclude from the receipt of stolen property newspaper reporters where the property was stolen from the Government and consisted of information.

I am asking you if you would include in that representatives of foreign press, such as the London Times?

MR. LANDAU. As a policy question?

MR. BLAKEY. That is all we can deal with initially in redrafting the statute.

MR. LANDAU. We can deal with the Constitution.

Pearson v. Dodd is not a policy question opinion, nor is the *Lewis and Clark Dairy* case, nor is the *Rickover* case. Those are constitutional cases.

MR. BLAKEY. If the Government does not have a proprietary interest in the information for some purpose, such as the *Rickover* case involved, it might very easily have it for other purposes?

Mr. LANDAU. A proprietary interest?

Mr. BLAKEY. Yes, it might have a proprietary interest for some purposes but not others.

The only question I am really asking you—

Mr. LANDAU. It certainly has enough of a proprietary interest, for example, to repulse attempts to steal it.

Mr. BLAKEY. Well, that is the question. If that is sufficient for repulsing attempts to steal it, why wouldn't it be sufficient for prohibiting its receipt?

Mr. LANDAU. Well, I think there are two issues here.

One is the concept that the Government owns the paper and we are basically not dealing with that here. I assume, with a circumstance where the reporter is going in and breaking up desk drawers but gets leaked information.

Nobody would defend somebody taking a crowbar and going into a Government office and taking a report.

Mr. BLAKEY. I take it that you really haven't squarely responded to me when I asked you would you include a representative of a foreign newspaper in your newspaper exclusion.

Would you include a representative of the London Times?

Mr. LANDAU. I suppose as a general principle, you would have to extend—the First Amendment, now we are talking about the First Amendment, right?

Mr. BLAKEY. You can answer both.

Mr. LANDAU. Under the First Amendment I would assume you would have to extend *Pearson v. Dodd* to a foreign resident alien.

You might run into different problems when we get involved with newspapermen who are clearly agents of their foreign government.

We might face then an espionage problem about being an agent for a foreign power.

But we have not actually compared and tried to resolve the conflict on that issue.

This basically is the first of our complaints and I think it is important to note here the Government's attempts to reinterpret the existing law the way that it is drafted, the new statute would automatically subject a newsman to criminal penalties of theft, receiving stolen property and obstruction of a government function by fraud for possession and publication of national security information and any other type of government information regardless of the effect that this information would have on the national security or general welfare or any other legitimate policy power and excess that we would like to talk about.

Then it seems to us that when the Administration starts proposing automatic blanket criminal penalties for publication alone, then that is in effect a criminal libel or a press licensing law, because that means that the only government information which can be published free from any threat of prosecution is information which the Government decides it wants the public to have.

Mr. BLAKEY. There is a basic limitation that the statute itself is limited to information related to national defense.

Mr. LANDAU. Well, now we are talking about the other sections.

I am still talking about the revision to 641. We can use this revision of the interpretation of 641 actually, now, to get at government

information regardless of whether there is any effect on the national security. The Government has made the statement for the first time in the *Ellsberg* case, when they claimed the Government owns facts, and furthermore, that Ellsberg is accused of obstructing the Government in its lawful function of controlling the dissemination of government information.

Now, they face a lot of conceptual problems in that case and they tried to get a lot of the conceptual problems that have been raised in this statute.

The second set of objections we have roughly parallels the objections or questions raised by Senator Hart and that is, one, that they redefined the Espionage Act under substantially looser standards than in the existing Espionage Act and added this new section, 1122, which prohibits the communication of any national defense information.

The definition of national defense information covers such a broad area that it is very difficult to try to discover what kind of information from the Defense Department or the State Department a newspaper could publish without being subjected to the threat of a criminal prosecution under 1121 or 1122.

Now, here again, the Government is trying to subject the press to the threat of criminal prosecution for a whole generic area and a very vague one at that—government information for publication, not for effect.

All they have to prove is this is national security and falls within those 11 or 12 definitions, and that is it.

There is no reliance on the *Shank* doctrine. There is no reliance on the doctrine suggested in the *Pentagon Papers* case.

There is no necessity to prove under this statute that there is any substantial damage to the national security.

MR. BLAKEY. Would you equate the substantial damage to the national security or possibility therefor with meeting the *Shank* test of clear and present danger?

MR. LANDAU. Well, I have not traced down the digest opinion on the refinements of *Shank*, but I think that our committee has taken the position that the clear and present danger test or something close to it, certainly should be the standard when it comes to criminally prosecuting the news media for publishing government information about the decision making process or the fact finding processes of the Government.

I don't think it is fair, Mr. Blakey, when the Washington Post and the New York Times or any newspaper in this country wants to publish something out of the State Department or the Defense Department for their lawyers to have to go back and research through the legislative hearings of this subcommittee to find out what that statute intends to say.

I think that statute should be clear and definite on its face, and newsmen should know what they are facing when they publish it.

I don't think we should rely on Mr. Maroney or some Executive group in the White House whom we have no ability to communicate with, to tell us after the fact, yes, you can publish that or No, you are going to jail.

That, it seems to me, is much too vague a standard for a criminal statute.

We would like, with your permission, to submit several exhibits for the committee.

One exhibit involves a case in California where they actually have prosecuted a newspaper for receiving stolen government information.

We submitted a brief in that case to the Supreme Court of California on the question of using this type of statute against newspapers and we would very much appreciate including at least whatever sections of the brief you might think helpful in the record.

We would also like to submit two stories by Morton Kondracke, a reporter from the Chicago Sun Times who interviewed Mr. Gainer and quotes Mr. Gainer as saying that the receiving stolen property statute could be used against the press for receiving any unauthorized government information, either by xerox copies, in writing, or verbally over the telephone.

Senator HRUSKA. Leave is granted for that purpose.

If you will, Mr. Landau, submit those documents to counsel for the committee and he will take custody and make such use of them as the record or files may indicate.

Have you any further questions, Mr. Blakey?

Mr. BLAKEY. No, not at this time.

Mr. LAZARUS. No.

Senator HRUSKA. Very well.

Thank you for coming, and it was nice of you for returning this afternoon.

The committee will recess until 10 a.m. tomorrow in this same room. A list of witnesses is available with counsel and we will resume our session at that time.

[Whereupon, at 2:50, the committee recessed until 10 a.m., at the same place.]

REFORM OF FEDERAL CRIMINAL LAWS

THURSDAY, MAY 3, 1973

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:05 a.m., in room 2228, Dirksen Senate Office Building, Senator Roman L. Hruska, presiding.

Present: Senator Hruska (presiding).

Also Present: G. Robert Blakey, Chief Counsel; Paul C. Summitt, deputy chief counsel; Dennis C. Thelen, assistant counsel; Kenneth A. Lazarus, minority counsel; and Mable A. Downey, clerk.

Senator HRUSKA. The subcommittee will come to order.

As yesterday, I have been asked to preside in the place of Senator McClellan, who is the chairman of the subcommittee, and currently engaged in defense appropriations hearings.

Today we will continue with the legislative hearings on the proposed new Federal Criminal Code and will receive testimony from a variety of witnesses on S. 1 and S. 1400.

Our first three witnesses this morning were to have been Judge Albert B. Maris, senior judge of the Third District, who serves very ably as chairman of the Committee on Rules of Practice and Procedure of the Judicial Conference; second, Prof. Frank Remington of the University of Wisconsin Law School, who is reporter of the Advisory Committee on the Federal Rules of Criminal Procedure; and third, Prof. Wayne LeFave of the College of Illinois, who is also a reporter on the Advisory Committee of the Federal Rules of Criminal Procedure.

Professor LeFave could not come, but we are favored with the two first witnesses.

Your Honor, if you would proceed we would be pleased to hear from you.

STATEMENT OF ALBERT B. MARIS, SENIOR U.S. CIRCUIT JUDGE, PHILADELPHIA, PA., AND FRANK J. REMINGTON, PROFESSOR, THE UNIVERSITY OF WISCONSIN LAW SCHOOL, MADISON, WIS.

Judge MARIS. My name is Albert B. Maris, senior circuit judge from the Third Circuit, and I have been chairman from the beginning of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

Our committee and the Advisory Committee on Criminal Rules, which works with us in that field, were requested by the chairman of

(5503)

your subcommittee to cooperate with the subcommittee in connection with the proposal of S. 1. that procedural provisions now appearing in title 18 as substantive law be transferred to the criminal rules, since they are in the nature of rules, and that they be enacted by the Congress as amendments to the existing Federal Rules of Criminal Procedure and thereby become a part of that body of procedural rules.

The conference, the Judicial Conference, in whose service we act approved this proposal, this request by Senator McClellan, and thereby approved in principle the idea of S. 1. that this manner of treating the present procedural provisions of title 18 be carried forward by the Congress.

Pursuant to the authority which we thus received from the Judicial Conference, our two committees met last March with counsel for the subcommittee and considered in detail and in depth all of the proposed rules which have been incorporated in S. 1 in carrying out this program, and we came to unanimous conclusions with respect to all of them in conference with counsel to the subcommittee.

Those suggestions have been put in the form of a memorandum which has been prepared by our reporter, Professor Remington, and I think with this preliminary statement, I would like to turn to him, since he is the technician, and the one who has the details of this matter in hand and ask him to make a brief preliminary statement and then submit for your consideration the memorandum which he has.

Senator HRUSKA. Thank you very much.

Judge MARIS. Following that, of course, we are prepared to answer any questions which the committee may want to give to us.

Senator HRUSKA. Professor Remington.

Mr. REMINGTON. Mr. Chairman, as Judge Maris indicated, the standing committee and a special subcommittee of the Advisory Committee on Criminal Rules did meet and did give consideration to the rule proposals which are contained in S. 1. We had the advantage of meeting with Mr. Blakey, who also met with the committee, and engaged in the discussion.

There is on file with the reporter a detailed memorandum indicating in detail, rule by rule, the reaction of the group that met with regard to the specific proposals and we will not try here this morning to repeat those unless there are questions.

[Memorandum is as follows:]

UNIVERSITY OF WISCONSIN-MADISON,
LAW SCHOOL,
Madison, Wis., May 1, 1973.

MEMORANDUM

To: Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary
From: Advisory Committee on the Rules of Criminal Procedure
Subject: S. 1 Proposed Rules of Criminal Procedure

There follows a rule-by-rule analysis of the material in Title II of S. 1. The analysis represents the views of some of the members of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States and a special subcommittee of the Advisory Committee on the Criminal Rules. The analysis is a result of a meeting attended by members of the Standing Committee and of the Advisory Committee which took place on

March 14, 1973. That meeting was called for the express purpose of considering the proposed changes in the rules which are contained in Title II of S.1.

In addition to the rule-by-rule comments, there are two general recommendations.

(1) Insofar as there are differences between the proposals in Title II of S. 1 and the proposed amendments to the criminal rules now pending before the Supreme Court, the judgment is that the version pending before the Supreme Court is preferable.

(2) Insofar as Title II of S. 1 proposes to add certain evidentiary rules to the rules of criminal procedure, this is appropriate pending a decision by Congress as to whether or not to approve the proposed Rules of Evidence.

Rule 3.1—Commencement of Prosecution. This is approved subject to the changes indicated on the revised draft attached hereto.

Rule 4—Warrant or Summons upon Complaint. Subdivision (d) should be eliminated as unnecessary because it is clear, under current procedure, that a person is committed for trial on the basis of a complaint, indictment, or information and not a warrant. It is doubtful that subdivision (e) is necessary.

Rule 5.1—Preliminary Examination: Time. This proposal is adequately covered by existing rules 5 and 5.1. The exception is proposed subdivision (d) which could better be inserted in present rule 5 (c). A proposal to this effect is attached hereto.

Rule 6.1—Special Grand Jury. There is no opposition to this proposed rule with the exception that the phrase "chief judge of the" be stricken in line 20 on page 242.

Rule 15—Depositions. We prefer proposed rule 15 now pending before the Supreme Court. A copy of that proposal is attached hereto.

Rule 16.1—Demands for Production of Statement and Reports of Witnesses. This is appropriately incorporated into the rules. If proposed rule 16 now pending before the Supreme Court is approved, some editorial changes in rule 16.1 will be necessary.

Rule 16.2—Capital Offense. Rule 16.2 (1) is adequately covered by present rule 11. Rule 16.2 (2) is now uniformly done in practice, although it is not mandated by any existing rules. This matter will be added to the agency for the August meeting of the Criminal Rules Committee. Rule 16.2 (3) is adequately covered by proposed rule 16 now pending before the Supreme Court. If proposed rule 16 is not adopted, (3) will be necessary. It is suggested that it might be added to any statute which is enacted providing for capital punishment. Otherwise, it would be appropriately included in a proposed rule 16.2 affording enlarged discovery in capital cases.

Rule 23.1—Trial by Magistrate. This proposal is adequately covered by the present magistrates' rules and, therefore, should be dropped. Editorial changes in the magistrates' rules will be necessary if S.1 is enacted.

Rule 25.1—Principles of Proof. If 25.1 (b) is adopted, present rule 31 (c) should be repealed.

Rule 26.2—Foreign Documents. This is appropriately added to the rules of procedure.

Rule 28.1—Accused as Witness. This proposal is unnecessary because the result would be the same under current practice without a special statute or rule.

Rule 32—Presentencing Procedures. If to be adopted, certain changes should be made in the proposal. These are reflected in a redraft of proposed rule 32 which is attached hereto. In general, the provisions of proposed rule 32 pending before the Supreme Court are preferred.

Rule 32.1—Sentence and Judgment. A suggested change in rule 32.1 is reflected in the draft attached hereto.

Rule 32.2—Sentencing Dangerous Special Offender. It is suggested that rule 32.2 be changed in the manner suggested in the attached draft.

Rule 32.3—Probation Officers. This is not appropriately included with the rules of procedure. It is suggested that it be transferred to page 201 of S.1.

Rule 40—Commitment to Another District: Removal. It is probable that this provision is no longer necessary.

Rule 41—Search and Seizure. Subdivision (i) is not necessary because it is covered by present rule 41 (b) (1).

Rule 42.1—Jury Trial for Contempt in Labor Cases. This is more appropriately kept in the statutes.

Rule 42.2—Security of the Peace and Good Behavior. This is more appropriately kept in the statutes.

Rule 44.1—Counsel. Subdivisions (e), (f), and (g) should be kept in the statutes. An appropriate place would be page 184 of S. 1.

Rules 46.1—46.4. These provisions of the Bail Reform Act contain critically important policy issues which are better dealt with by Congress, and the provisions should therefore be retained in the statutes.

*RULE 3.1.—COMMENCEMENT OF PROSECUTION

"A prosecution is commenced for purposes of the statute of limitations upon the filing of a violation notice, a complaint, an indictment, or an information. Commencement of prosecution for one offense shall be deemed commencement of prosecution for any included offense or offenses. A prosecution shall be deemed to have been timely commenced notwithstanding that the period of limitation has expired:

"(a) for an offense included in the offense charged, if as to the offense charged the period of limitation has not expired or there is no such period, and there is after the evidence on either side is closed at the trial, sufficient evidence to sustain a conviction of the offense charged; or

"(b) for any offense to which the defendant enters a plea of guilty or nolo contendere with knowledge that the statute of limitations has run."

RULES OF CRIMINAL PROCEDURE FOR THE U.S. DISTRICT COURTS AS AMENDED TO OCTOBER 1, 1972

Rule 5. Initial Appearance Before the Magistrate.

(a) IN GENERAL.—An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate, the magistrate shall proceed in accordance with the applicable subdivisions of this rule.

(b) MINOR OFFENSES.—If the charge against the defendant is a minor offense triable by a United States magistrate under 18 U.S.C. § 3401, the United States magistrate shall proceed in accordance with the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates.

(c) OFFENSES NOT TRIABLE BY THE UNITED STATES MAGISTRATE.—If the charge against the defendant is not triable by the United States magistrate, the defendant shall not be called upon to plead. The magistrate shall inform the defendant of the complaint against him and of any affidavit, filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of the general circumstances under which he may secure pretrial release. He shall inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall also inform the defendant of his right to a preliminary examination. He shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided by statute or in these rules.

A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate shall forthwith hold him to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if he is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination. With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal

cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate. In the absence of such consent by the defendant, time limits may be extended by a judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

An arrested person who has not been accorded a preliminary examination within the period of time fixed in compliance with this rule shall be discharged from custody or from the requirement of bail or any other condition of release without prejudice, however, to the institution of further criminal proceedings against him upon the charge upon which he was arrested.

Rule 15. Depositions.

(a) When Taken. Whenever due to special circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.

(b) Notice of Taking. The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition. The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce him at the examination and keep him in the presence of the witness during the examination. A defendant not in custody shall have the right to be present at the examination upon request subject to such terms as may be fixed by the court, but his failure, absent good cause shown, to appear after notice and tender of expenses in accordance with subdivision (c) of this rule shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

(c) Payment of Expenses. Whenever a deposition is taken at the instance of the government, or whenever a deposition is taken at the instance of a defendant who is unable to bear the expense of the taking of the deposition, the court may direct that the expenses of travel and subsistence of the defendant and his attorney for attendance at the examination shall be paid by the government.

(d) How Taken. Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that (1) in no event shall a deposition be taken of a party defendant without his consent, and (2) the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The government shall make available to the defendant or his counsel for examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the government and to which the defendant would be entitled at the trial.

(e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as defined in subdivision (g) of this rule, or the witness gives testimony at the trial or hearing inconsistent with his deposition. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.

(f) Objections to Deposition Testimony. Objections to deposition testimony or evidence or parts thereof and the grounds for the objection shall be stated at the time of the taking of the deposition.

(g) Unavailability. "Unavailable" as a witness includes situations in which the deponent:

(1) is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his deposition; or

(2) persists in refusing to testify concerning the subject matter of his deposition despite an order of the judge to do so; or

(3) testifies to a lack of memory of the subject matter of his deposition; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his deposition has been unable to procure his attendance by process or other reasonable means. A deponent is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his deposition for the purpose of preventing the witness from attending or testifying.

(h) Deposition by Agreement Not Precluded. Nothing in this rule shall preclude the taking of a deposition, orally or upon written questions, or the use of a deposition, by agreement of the parties with the consent of the court.

"RULE 32.—PRESENTENCING PROCEDURES

"(a) PRESENTENCE COMMITMENT.—When a person has been convicted of a felony, and the court is of the opinion that imprisonment presently appears to be warranted, the court may commit such offender to the custody of the Bureau of Corrections for a period not exceeding 90 days. The Bureau shall conduct a complete study of the offender during that time, inquiring into such matters as the offender's previous delinquency or criminal experience, his social background, his capabilities, his mental, emotional, and physical health, the significant problem or problems involved in the offense of which he has just been convicted, and the rehabilitative resources or programs which may be available to suit his needs. By the expiration of such additional time as the court shall grant, not exceeding a further period of 90 days, the offender shall be returned to the court for final sentencing. The court shall be provided with a written report of the results of the study, including whatever recommendations the Bureau believes will be helpful to a proper resolution of the case. After receiving the report and the recommendations, the court shall proceed finally to sentence the offender in accordance with the sentencing alternatives available under section 1-4A1 of the Federal Criminal Code.

"(b) PRESENTENCE INVESTIGATION.—In any other case, before making a disposition, the court may order a presentence investigation made by the Federal probation service which shall submit a report of its investigation to the court. The report shall be in writing and, so far as practicable, shall include an analysis of the circumstances attending the commission of the offense, the offender's history of delinquency or criminality, physical and mental condition, family situation and background, social, economic, and educational background, job experience and occupational skills and aptitude, personal habits, and any other matters including a release plan if appropriate that the probation officer deems relevant or the court directs to be included.

"(c) MAGISTRATE.—A magistrate who exercises trial jurisdiction and before whom a person is convicted or pleads either guilty or nolo contendere may, with the approval of a judge of the district court, direct the probation service of the court to conduct a presentence investigation on that person and render a report to the magistrate prior to the imposition of sentence.

"(d) EXAMINATION OF REPORTS.—Before imposing sentence, the court or magistrate shall permit the attorney for the government and counsel for the offender, or the offender if he is not represented by counsel, to inspect the presentence reports. In extraordinary cases, the court may withhold material not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation and any source of confidential information. A court withholding all or part of a presentence report shall inform the parties of its action and place in the record the reasons therefor. The court may require parties inspecting all or part of a presentence report to give notice of any part thereof intended to be controverted.

"(f) USE OF INFORMATION.—No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an

offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

Rule 32.1

(2) The present Rule 32, Sentence and Judgment, with the exception of subdivision (c) which is repealed, is redesignated "Rule 32.1.—Sentence and Judgment" and amended by the addition of the following subdivisions:

"(g) MODIFICATION OF PROBATION.—During the period of probation or conditional discharge, upon application of a probation officer or of the offender or upon its own motion, the court may, after a hearing upon notice to the probation officer, the offender, and the attorney for the government, modify the requirements imposed on the offender or add further conditions of release authorized by statute. The court shall modify any requirement that in its opinion imposes an unreasonable burden on the offender. The court, on application of a probation officer or of the offender or upon its own motion, may discharge the offender at any time.

"(h) PROBATION A FINAL JUDGMENT.—Notwithstanding the fact that probation can subsequently be modified or revoked, a judgment which includes such a disposition is a final judgment for all other purposes.

"(i) ARREST OF PROBATIONER.—At any time within the period of probation, or within the maximum probation period authorized, the court for the district in which the probationer is being supervised or if he is no longer under supervision, the court for the district in which he was last under supervision, may issue a warrant for his arrest for violation of probation occurring during the period of probation. Such warrant may be executed in any district by the probation officer or the United States marshal of the district in which the warrant was issued or of any district in which the probationer is found. If the probationer shall be arrested in any district other than that in which he was last supervised, he shall be returned to the district in which the warrant was issued, unless jurisdiction over him is transferred to the district in which he is found, and in that case he shall be detained pending further proceedings in such district. As speedily as possible after arrest the probationer shall be taken before the court for the district having jurisdiction over him."

"Rule 32.2—SENTENCING DANGEROUS SPECIAL OFFENDER

"(a) NOTICE.—Whenever an attorney for the government has reason to believe that a defendant who is charged with a felony in a court of the United States is a dangerous special offender, such attorney may sign and file with the court, a reasonable time before trial or acceptance by the court of a plea of guilty or nolo contendere, a notice specifying that the defendant is a dangerous special offender who upon conviction of such felony is subject to the imposition of a sentence as a dangerous special offender and setting out with particularity the reason why such attorney believes the defendant to be a dangerous special offender. The court may, on its own motion, convene a hearing, after conviction and after giving due notice to the defendant and to the attorney for the government, for the purpose of determining whether the defendant is a special dangerous offender. Such notice may also be filed by the court on its own motion at any time. In no case shall the fact that the defendant is alleged to be such an offender be an issue upon the trial of such felony or be disclosed to the jury. If the court finds that the filing of such notice as a public record may prejudice fair consideration of a pending criminal matter, it may order the notice sealed and the notice shall not be subject to subpoena or public inspection during the pendency of such criminal matter, except on order of the court, but shall be subject to inspection by the defendant who is alleged to be a dangerous special offender or his counsel.

"(b) HEARING.—Upon any plea of guilty or nolo contendere or verdict or finding of guilty of such felony, a hearing shall be held by the court sitting without a jury before sentence is imposed. Except in the most extraordinary cases, the court shall obtain both a presentence commitment and a presentence investigation report before holding a hearing under this subdivision. The court shall fix a time for the hearing. In connection with the hearing, the defendant and the United States shall be entitled to assistance of counsel, compulsory process, and cross-examination of such witnesses as appear at the hearing. A duly authenticated copy of a former judgment or commitment shall be prima facie evidence of such former judgment or commitment. If it appears by a preponderance of the information, including information submitted during the

trial of such felony and the sentencing hearing and so much of the presentence reports as the court relies on, that the defendant is a dangerous special offender and that an upper-range term of imprisonment is necessary for the protection of the public, the court shall sentence the defendant to imprisonment for an appropriate term as authorized by statute. The court shall place in the record its findings, including an identification of the information relied upon in making such findings and its reasons for the sentence imposed.

Mr. REMINGTON. There are, however, two or three general point of consensus that may be of interest at this point.

The first is, that there are several proposals to amend the rules of procedure which we think better left in statutory form, because they raise basic policy issues which in the view of the committees could better be dealt with by the Congress rather than by the rulemaking process.

Perhaps most important of those is the matter of bail. There are other suggestions of this kind contained in the memorandum. But it was the view of the committees that the most basic policy question involved is the matter of bail, which raises questions better dealt with by the Congress through legislation as opposed to the rulemaking process.

The second general point of consensus is that where there are differences between the proposals in S. 1 and the proposals for rule changes now pending before the Supreme Court of the United States, the versions now pending before the Supreme Court of the United States are preferable.

I should say that the differences are relatively minor. They deal not with basic policy questions, but there are differences which we think of sufficient significance to recommend their incorporation into S. 1.

With regard to the third general matter, it was the view of the committees that it is appropriate at this time to do, as S. 1 proposes to do—that is incorporate various evidentiary provisions into the rules of procedure, pending a decision by the Congress as to whether or not to adopt rules of evidence. If rules of evidence are adopted by Congress, several of the proposals in S. 1 ought to be transferred into the rules of evidence. However, at this time, since we do not have rules of evidence, it is appropriate for the Congress to place rules of evidence, such as proof of foreign law into the rules of procedure.

Senator HRUSKA. Do I understand you to say, Professor, that there are overlapping provisions in the rules now before the House Judiciary Committee and also in some of the procedural rules which you now have before the Supreme Court?

Mr. REMINGTON. There are some proposals in S. 1.

Senator HRUSKA. I don't need the details at this time. But that was the purport of your statement?

Mr. REMINGTON. Yes; there were some provisions which should not be in the rules of procedure because they are evidentiary rules, but at this time, since there are no rules of evidence, it is appropriate to do what S. 1 proposes and that is to put them into the rules of procedure.

Aside from these three general reactions there are some specific reactions which are set forth in detail in the memorandum. They are not of sufficient significance at this time to detail those orally.

I would like to ask leave, at this time, to add as part of my remarks the memorandum which has been filed with the reporter. [See p. 5504.]

Senator HRUSKA. Thank you very much.

There are several policy questions in this regard that I should like to discuss with you. They have received some attention from staff and members of the committee relative to the advice of including criminal rules within the context of any code that we develop.

First of all, that this effort be approached by the Congress or by the courts in accordance with the current procedures under the Enabling Act.

You have indicated that you would like to see included in statute form the substance of the procedural rules which you have developed.

Judge MARIS. We would like to see those matters incorporated in the Federal Rules of Criminal Procedure rather than continued as substantive statutory provisions as they now are in title 18.

Senator HRUSKA. I see.

Judge MARIS. We think the way you are proposing in S. 1 is an appropriate way to effect this transfer.

Another way would be to have them go through the formal rule-making process by the Supreme Court, but since some of them relate in part to substantive provisions proposed by S. 1, perhaps this is a more orderly way to do it, and would bring about their enactment at the same time, rather than perhaps having some time lag due to the differing periods of time involved in the legislative or the judicial process.

We have no objection, the Conference expressed no objection, to the Congress proceeding in the way proposed by S. 1, understanding, of course, that this is not intended in any way to detract from the rulemaking power of the Supreme Court in the future to give consideration to these and all other rules if at the time the interests of judicial administration should require some amendment or change in them.

Senator HRUSKA. But you did say your preference was to handle it under the rulemaking powers that are provided for in the court?

Judge MARIS. With respect to these particular proposals?

Senator HRUSKA. Yes.

Judge MARIS. I don't think the Conference has made any proposals. That would be the normal way we would be proceeding, but in this instance, the Conference has expressed no disapproval of proceeding in the manner in which S. 1 proposes to proceed.

Senator HRUSKA. There were some misgivings expressed that the inclusion of the rules in S. 1 as we find them now might weigh down our efforts toward a substantive code and make it more unmanageable because it may introduce some differences of opinion.

What comment would either of you have in that regard?

It is a very ambitious piece of legislation by both scope and sheer mass.

What thoughts would you have on that, Judge Maris?

Judge MARIS. Well, it doesn't seem to me that, as I recall the provisions that are now being proposed to be included in S. 1 in the

title relating to rules, they are of such significance or of such controversial nature as to give rise to any real question.

The only question it seems to me that might arise is whether it is the right way to do it.

Congress has the residual authority to make rules; there is no question about that. It has granted that power to the Supreme Court subject to its supervision and its review after it is done.

The Conference, as I say, has expressed no opinion that this proposal that you are now including in S. 1 is an inappropriate way to proceed.

Senator HRUSKA. Have you any thoughts on that, Professor?

Mr. REMINGTON. I would agree that it is difficult to pass a major provision of this type, desirable though it is, and the more you add the more difficult it becomes.

But it does seem to me the rule provisions in S. 1 are not particularly controversial and I would think that it would not significantly impair the chances of passage to include the procedural proposals as part of S. 1.

Senator HRUSKA. Third, there was raised this question: Whether consideration of procedural rules at this time by the subcommittee might leave many issues unaired but nevertheless would preclude comprehensive consideration of procedural reform by the Congress for years to come.

There is a tendency when an action is taken in a given area, to say as a postscript, "Oh, well, we acted on that in 1973," or "We acted on that in 1974. Let's leave that gel for a few years and see how it works."

What merit might there be to that type of thinking?

Judge MARIS. I really don't see much merit in that, Senator, for this reason:

This is not proposed to be a comprehensive revision of criminal procedure. This is only a proposal to bring forward into the rules those provisions which were left in title 18 when the original criminal rules were adopted and leave a rather untidy situation in that most criminal rules are in the Federal Rules of Criminal Procedure but some few of them must be looked for in title 18.

If the Congress were now undertaking to make a complete revision of criminal procedure then I think the points you make might be well taken. But I don't think the Congress is undertaking to do that or in effect take over the responsibility of the Supreme Court to keep this area under continuous review.

The Judicial Conference of the United States regards this as its duty under the statute which requires it to carry on a continuous review of the procedure. It regards it as its duty to continuously keep under study the criminal procedure. We have the Advisory Committee on Rules of Criminal Procedure which is in continuous existence with reporters working continually in this field and it will continue to do so if and after S. 1 is enacted. So that I wouldn't think that we will need to have much concern about the point that you raise.

Senator HRUSKA. Have you anything further?

Mr. REMINGTON. No; I agree with that.

Senator HRUSKA. Now, you have mentioned S. 1 several times.

S. 1400 was not introduced until much more recently, and I presume your memorandum probably was formulated prior to the time of S. 1400.

Had you considered S. 1400 and any differences that might be in it as compared to the provisions in S. 1 on this particular subject?

Judge MARIS. Well, I don't think we have, Senator. But——

Senator HRUSKA. I am sorry. S. 1400 doesn't have any so you can't compare it.

Judge MARIS. That is the point. I understand it doesn't deal with this area with which we are now concerned.

It deals with substance and we are not here to discuss substance today.

Senator HRUSKA. Well, we have already covered that part of it.

It is a policy question, therefore, whether they will do it in S. 1 and include these or whether they will proceed along the lines of 1400, which leaves them to other devices.

Judge MARIS. That means if S. 1400 were adopted, there would be a direct question raised by our committee and the Supreme Court as to whether the Court shouldn't undertake to incorporate these procedural provisions which remain into the Federal Rules by its process.

Senator HRUSKA. Well, Congress has spoken its mind a bit on the subject of the enabling act and I see very little reason to believe that their attitude with reference to rules of criminal procedure would be much different than the attitude that was adopted in regard to the rules of evidence themselves.

So that is a factor that we can take into consideration.

Judge MARIS. It is, but I would think there are more questions that might be raised with respect to the rules of evidence upon the theory that perhaps some of them impinged in the substantive area; whereas, the rules of procedure we are talking about are unquestionably true rules of procedure having nothing to do with substance.

Senator HRUSKA. I didn't refer to the substance so much as to the procedure, because there are some of us who have taken a dim view of that enabling act.

It is not a very practical method of having congressional view obtained of any court action on whatever the rules deal with.

I hope some day that we can reform that statute and give us a little different time frame within which to operate.

Judge MARIS. We can thoroughly understand your position there. The problem is this:

If the courts, as I think is quite right and sound, are given the authority to deal with their own procedure, then, if the time lag between action and effective date is lengthened, it makes it much more difficult to deal with the problems as they arise.

In other words, there is pretty much of a time lag now. By the time the advisory committee does its work and publishes it may be 2 or 3 years.

So there is a problem in that regard which has to be considered.

Senator HRUSKA. Mr. Blakey, have you any questions?

Mr. BLAKEY. No; I would just like to extend my appreciation and the appreciation of the staff to the judge and Professor Remington

and the other members of the Advisory Committee for the enormous amount of time that they have put in on this and the help they have been to us in looking at this and formulating questions for the Subcommittee. We certainly appreciate all that you have done.

Thank you very much.

Senator HRUSKA. Thank you very much for coming and for all the effort you have so far put into it.

Judge MARIS. I appreciate the opportunity to be of service to the committee and on behalf of the Judicial Conference I can say this is a very satisfying relationship between the judicial branch and the congressional branch of government.

Senator HRUSKA. The leadership of Senator McClellan is one of the things that makes it a very happy situation.

Our next witness will be Professor Meador, of the School of Law of the University of Virginia.

Professor Meador is appearing here at this Senator's invitation.

In my judgment he is one of the more knowledgeable supporters of appellate review of sentences in the United States. I especially welcome him here today.

Will you proceed with your statement, Professor?

STATEMENT OF DANIEL J. MEADOR, PROFESSOR OF LAW, UNIVERSITY OF VIRGINIA

Mr. MEADOR. Sometime ago I submitted a brief written memorandum when the hearing was previously scheduled.

Senator HRUSKA. It will be included in the record at this point for reference for future readers.

[Full text follows:]

UNIVERSITY OF VIRGINIA,

SCHOOL OF LAW,

Charlottesville, Va., February 27, 1973.

Re S. 716—Appellate review of sentences

Hon. ROMAN L. HRUSKA,

*Committee on the Judiciary, Subcommittee on Criminal Laws and Procedures,
U.S. Senate, Washington, D.C.*

DEAR SENATOR HRUSKA: I appreciate the invitation from you and your staff counsel to appear before your subcommittee on Thursday morning, March 8 in connection with the hearings on appellate review of sentences. I will be happy to appear at that time to discuss some aspects of the English experience in reviewing sentences as well as some features of S. 716.

Enclosed is a memorandum which I have prepared for the subcommittee's use. This memorandum, with its two exhibits, is directed solely to some pertinent features of the English experience. I have deliberately kept this short. In my appearance on March 8 I can elaborate on this memorandum as well as make some additional observations about some features incorporated in S. 716.

I assume that your staff will notify me as to the exact time and place for the hearing on March 8.

Sincerely yours,

DANIEL J. MEADOR,

Professor of Law.

Enclosures.

UNIVERSITY OF VIRGINIA,
SCHOOL OF LAW,
Charlottesville, Va., February 28, 1973.

MEMORANDUM

To: Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate

Re: Appellate Review of Sentences—S.716

From: Daniel J. Meador, James Monroe Professor of Law, University of Virginia.

This memorandum is submitted in support of the principle of appellate review of sentences. Its purpose is to provide briefly some insights derived from English experiences with sentence review which suggest the utility of such review and how it operates in that country.

In most criminal cases the sentence is the most important decision, both for the defendant and for society at large. It is indeed anomalous that in the federal courts (and many state systems) this crucial element of the case is almost completely immunized from review. Whatever the justifications for appellate review of any trial court decisions, they apply with equal or greater force to the sentencing decision; this is a premise of the English system.

In addition, the English practice demonstrates that sentence review by an appellate forum is desirable for two special reasons: (1) Review provides a means of adjusting excessive sentences and of eliminating disparities in sentencing throughout the jurisdiction; (2) The process of reviewing sentences in an appellate forum provides a means of developing coherent sentencing policies for the guidance of trial judges, thereby contributing to more rational sentencing practices.

Information concerning excessiveness and disparities has been well-developed in the literature and in prior committee hearings; that will not be repeated here. The value of review as a means of formulating sentencing principles, however, has not been explored as thoroughly. On that, the experience in England is especially enlightening and will be commented on below.

Preliminarily, it should be stated that my awareness of the English system is derived chiefly from two periods of study of that system in operation. First, for several months in 1965-1966, while serving as a Fulbright lecturer in England, I studied sentence review as a consultant for the American Bar Association Project on Standards for Criminal Justice. The report which I prepared appears as an appendix in the A.B.A.'s *Standards Relating to Appellate Review of Sentences* (1968) (Appendix C, at pp. 94-157). Excerpts from that report are attached as Exhibit 1 to this memorandum. Second, for several weeks in 1971 I studied the procedures for reviewing convictions in the Court of Appeal, Criminal Division, in England, and wrote a substantial report for the Law Enforcement Assistance Administration. In the course of that study I obtained additional, and updated, insights into the review of sentences, which takes place in that same court.

That court (formerly known as the Court of Criminal Appeal) has been exercising jurisdiction to review sentences (as well as convictions) in criminal cases since its creation in 1908. During this uninterrupted experience of 65 years, there has been no objection registered to sentence review. It is a long accepted practice and is viewed as a salutary feature of the judicial process in criminal cases. This view appears to be shared in England by judges, lawyers, and law enforcement authorities. Indeed, the English are surprised to hear that there is any question in the United States about the value of sentence review.

In the English court sentences are reviewed only on the defendant's application for leave to appeal. Review lies in the court's discretion. The application for leave, in most cases, is acted on by a single judge of the appellate court. If the application is granted, the sentence is reviewed on its merits by a panel of three judges. They may alter or modify the sentence and impose any sentence which the trial court could have imposed. But the appellate court may not, since 1966, increase the sentence.

The volume of the sentence review business in the English court, up to 1965, is revealed by Exhibit 1. More recent figures from calendar year 1961 (the latest available) in the Court of Appeal, Criminal Division, are as follows:

Total applications for leave to appeal sentences and convictions	Against con- viction only	Against sen- tence only	Against conviction and sentence	Leave granted to appeal sentence	Sentences affirmed	Sentences altered
6,390	645	4,682	982	719	259	460

Thus of the total of 5,664 applications seeking review of sentences, the appellate court ultimately interfered with the sentence in only 460 instances, or about 8% of the applications. A total of 719 sentences were given full appellate review, out of the 5,664 applications filed. (These figures are from *Criminal Statistics, England and Wales, 1971*, Her Majesty's Stationery Office, London, Cmd. 5020).

The test which the Court of Appeal, Criminal Division, traditionally states that it employs in reviewing a sentence is whether the sentence is "erroneous in principle." As studies of the court's work have shown, this is not entirely revealing of the nature of the review. The court decides such matters as whether the sentence is contrary to sentencing principles enunciated in its previous decisions, whether the sentence is contrary to the court's judgment as to sound contemporary sentencing principles, whether the sentence is seriously out of line or excessive, and whether it is in accordance with the statutory framework for sentencing. Clearly, review extends beyond merely determining whether the sentence is excessive.

In deciding whether a sentence is excessive, the court stresses that it does not "tinker" with sentences. Its practice bears this out. Only if a sentence is substantially greater than the norm or usual pattern will the court alter it. The court intervenes only to "knock off the peaks" of excessiveness, as the English put it.

Review on grounds other than excessiveness is what permits the court to develop sentencing principles and policies. It does this case by case, in the traditional common law fashion. The value of sentence review for this purpose is well explained in an article by D. A. Thomas, "Appellate Review of Sentences and the Development of Sentencing Policy: The English Experience", 20 *Ala. L. Rev.* 193 (1968). A copy is attached as Exhibit 2 to this memorandum. Mr. Thomas is a member of the law faculty at Cambridge University and is on the staff of the Institute of Criminology. He has studied sentencing review in the English court for a number of years and has written extensively on various aspects of that subject. In 1967-69 he spent eighteen months in the United States as a Visiting Professor of Law at the University of Alabama.

The importance of sentencing review to sentencing practices and policies in England is impressively documented in a book by D. A. Thomas entitled *Principles of Sentencing* (Cambridge Studies in Criminology, Vol. XXVII, Heinemann Educational Books, Ltd., London, 1970). This volume of 350 pages is devoted to analyzing the sentencing decisions of the Court of Appeal, Criminal Division, from 1962 to 1969, to show the coherent body of sentencing principles which the court has developed through its decisions in individual cases. All aspects of this common law body of sentencing doctrine are explained. One of the conclusions is that "the jurisprudence of sentencing developed by the court over the last sixty years is the most highly evolved system of its kind in the English-speaking world, and a convincing demonstration of the potentialities of appellate review as a means of regulating and making creative use of the sentencing function."

That book and the attached article by Mr. Thomas make a persuasive case for authorizing a broad appellate review over sentences, allowing the court to employ such standards as "erroneous in principle" or "improper" or "inappropriate." Under a review limited solely to the question of excessiveness such a body of sentencing law could not very well be developed. However, review for excessiveness is one important feature of the English review. And in the United States, this type of review is perhaps of the most immediate importance.

EXHIBIT 1

APPENDIX C: THE REVIEW OF CRIMINAL SENTENCES IN ENGLAND

[A report submitted to The American Bar Association project on Minimum Standards for Criminal Justice]

(By Daniel J. Meador, Dean)

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INTRODUCTION

The principle of subjecting a sentence imposed by a court for a criminal offence to the review of a higher court, as well as to non-judicial scrutiny, is well established in England. This report attempts to set forth an objective description of the procedures by which this principle is effectuated. It is not intended to be a brief for or against any position. The study has been carried out through observing court proceedings and the accompanying administrative machinery, and by talking with numerous individuals. Background library research has been undertaken, but this is essentially a "field study" of sentencing review in operation.

Part I of the report gives in sketchy outline the judicial system in which English criminal cases are tried, sentences are imposed, and appellate review carried out. No more detail is included than seems necessary for an understanding of the main body of the report.

Sentencing review cannot be considered meaningfully apart from some awareness of how the sentence is initially arrived at in the trial court. Consequently, Part II of the report deals with the original sentencing process.

Part III on Judicial Review of Sentences is the heart of the report. Such review takes place at two levels—in the many county and borough Quarter

Sessions, and in the single Court of Criminal Appeal.* The operation of sentencing review in these courts has been the central focus of this study, and an effort is made to present a full description.

What is referred to in the United States as executive clemency is administered in England through the Home Office, under the authority of the Secretary of State for Home Affairs, and is called the "prerogative of mercy." A report on sentencing review would not be complete without taking it into account. This non-judicial form of review is treated in Part IV.

The report concludes with a summarization keyed to the standards adopted by the Advisory Committee on Sentencing and Review. This section is designed to provide an easy comparison between these proposals and the English practice.

This investigation was launched on September 23, 1965, when I met in London with Chief Judge J. Edward Lumbar, the ABA Project Chairman, and Sir George Coldstream, Permanent Secretary to the Lord Chancellor. The latter arranged for Judge Lumbar and me to meet that day with Sir Charles Cunningham, Permanent Secretary of the Home Office, and two members of his legal staff, and with Master D. R. Thompson, the Registrar of the Court of Criminal Appeal, in the Royal Courts of Justice. Through arrangements thereafter made by these and other officials I have attended one or more sittings of the following courts: Hampshire County Quarter Sessions, Southampton Borough Quarter Sessions, Surrey County Quarter Sessions, Southampton Magistrates' Court, the Central Criminal Court (Old Bailey), and the Court of Criminal Appeal. Access was afforded to the case files in these courts and interviews have been held with various court officials as well as with judges, law professors, and practising members of the legal profession. The persons who contributed most significantly are recorded in the Meador Report Appendix 4. It is appropriate to say here that without the full cooperation and assistance of these individuals, so courteously tendered, this report would not have been possible.

A preliminary word might be said about English terminology. It varies in many small ways from American legal usage. An "indictment" in England, for example, does not imply grand jury action, for there is no grand jury. When one refers to a trial on indictment he is speaking of a jury trial in either Quarter Sessions or the Assizes, as distinguished from a summary trial in a Magistrates' Court. The English say "appeal against sentence," whereas in the United States we would tend to say appeal *from* or *of* the sentence. "Counsel" in England means only a barrister; it never includes solicitors. Other variances in language will be clarified as they arise.

Certain features of the English legal world should be borne in mind in thinking about the practices described. Despite the outward trappings of formality in dress and manner, English judicial proceedings are essentially less formal in many respects than those in the United States. (At least they so appear to this observer.) In procedure and practice, less seems to be committed to writing; much of the *modus operandi* appears to be a matter of understood custom. This relatively informal and customary way of carrying on judicial business may result from the mutual confidence which appears to exist within the bench and bar. This in turn probably results from the fact that bench and bar form a rather tightly knit and homogeneous group sharing a well-defined tradition. While this has no bearing on the principle that all sentences be reviewable, it may help to explain in part some of the practices in sentencing and review which might otherwise seem curious.

Another point to be noted is that criminal sanctions are imposed less heavily in England than in the United States. Observation suggests that English judges give probation or a fine in cases where imprisonment would be imposed in America. English prison sentences are shorter. A three-year term is considered substantial, and seven or eight years a very long term. The thirty-year sentences given in the train robbery case are almost unheard of.

There is considerable ferment in England over numerous aspects of the criminal process. Recommendations from various sources have been made to change some of the structure and procedures described here. These will be alluded to only when they directly concern sentencing review, as an effort has been made to stick closely to this subject and to keep citations of authority to a mini-

*[Note: Subsequent to the preparation of this report, by a statute enacted August 9, 1966, the Court of Criminal Appeal became the criminal division of the Court of Appeal. Criminal Appeal Act, 1966, § 1.]

mum. The sources for the information in this report, unless otherwise specifically indicated, are personal observations, writings listed in the bibliography, and interview with persons listed in the Appendix and others.*

One recent study of particular relevance is that of the so-called Donovan Committee (named after its chairman, the Right Honorable Lord Donovan), entitled *Report of the Interdepartmental Committee on the Court of Criminal Appeal*. That Report, issued in August, 1965, contains a wealth of information about the Court of Criminal Appeal, as well as recommendations for certain changes in its organization and procedure. It will be cited hereafter as the Donovan Report.

B. SENTENCE REVIEW IN THE COURT OF CRIMINAL APPEAL

1. Initial procedure

An appeal against sentence may be taken to the Court of Criminal Appeal from Quarter Sessions, the Assizes, the Central Criminal Court, and the two Crown Courts. Reviewing sentences is a very large part of CCA business; few appeals come up as a matter of right, and of all the cases in which leave to appeal is sought, 80% involve sentence.

The defendant has ten days from the imposition of sentence in which to seek leave to appeal, although an extension of time may be and sometimes is granted. Since no appeals against sentence lie as a matter of right, the initial step is always the filing of an Application for Leave to Appeal. This is filed with the Registrar of the Court on a printed form which was designed by his Office (Form XXXIV). These forms are available in unlimited quantities in every prison. In fact they are actually printed and supplied by the prison authorities.

In the great majority of cases this application for leave is filled out in long hand by the prisoner himself, without legal assistance, though the prison authorities may give some help. The Registrar estimates that prisoners have professional legal advice in perhaps 200 out of the 2,500 to 3,000 applications filed annually for leave to appeal against sentences and convictions.

In completing the form the prisoner must supply certain factual data such as when and where he was convicted, for what offence, and the sentence imposed. He must then set out in narrative form the reasons why he seeks to appeal. More often than not this is simply a plea that the sentence is excessive and too harsh under all the circumstances. The applicant may include information which was not before the trial court, and he may bring in events occurring since the trial. He may also offer to produce witnesses and other evidence. The Court is not limited to the trial record.

The form provides a place for the prisoner to request legal aid. If he is not one of the few who have already retained a solicitor, the applicant will almost always make the request. If leave to appeal is granted, legal aid will usually be granted also. In 1964, leave to appeal was granted in a total of 351 cases, and legal aid in 335.¹ This typically means that counsel—a barrister—will be designated for the appellant, but not a solicitor, although the statute authorizes appointment of both counsel and solicitor.² Apparently counsel representing an accused at trial considers his duty terminated when the trial proceedings are concluded. The appellate stage is viewed as entirely new and independent.

Upon receipt of this application form the Registrar's office has multiple copies of it made on a typewriter, thus relieving the Registrar's staff and the judges of the burden of deciphering prison script. The original hand-written version simply remains in the Registrar's file. This typing job is done for the Registrar by special arrangement at one of the government typing pools and is done quite expertly to ensure that all the misspellings and other flaws in the original are preserved. The Registrar meanwhile notifies the clerk of the court where sentence was imposed, who in turn sends up all the papers in the case.

*Attached to the original of this report, for the use of the ABA Advisory Committee, were the complete court files in two cases in the Court of Criminal Appeal. These have not been printed here.

¹ See table on CCA for 1964 in Part III of this report (p. 122, *infra*).

² This practice is discussed and criticized in Napley, "The Court of Criminal Appeal: The Functions of an Instructing Solicitor," 61 *The Law Society's Gazette* 307 (1964).

These will mainly be those items mentioned earlier in the discussion of the sentencing process and will include the indictment, the antecedents, the probation report, if any, other reports which may have been filed, and the depositions. The Registrar usually orders a "short transcript" of the trial proceedings, which includes everything which took place in open court during the sentencing stage. (It does not include the evidence bearing on the issue of guilt.) This means that ordinarily the trial judge's statement of reasons for the sentence will be available to CCA.³ The Registrar may order a complete transcript, which would include the evidence if that seems desirable for some reason.

The papers from the trial court are sent forward to the Registrar by the clerk in a jacket known as a Form 2. On this covering jacket appears a list of all the documents included. These, together with the application itself and whatever transcript the Registrar may have ordered, constitute the record which is before the Court of Criminal Appeal. Precisely what the record contains depends to a large extent on what the Registrar orders; he will routinely get the items mentioned. The record may also contain new matter supplied by the applicant, for, as indicated earlier, the Court is not confined to the record made in the trial.

A word might be said here about the Registrar and his office force. Formally entitled the Criminal Appeal Office, this is a central part of the Court's machinery. It occupies quarters in the Royal Courts of Justice where all the royal courts sit in London (except the Central Criminal Court which is in the Old Bailey). The head position of Registrar, by statute, is filled by the Master of the Crown Office; he is a barrister named by the Lord Chief Justice. On his staff are five legally trained persons. Including typists and clerks, there are a total of 22 people in the Criminal Appeal Office which, viewed from an American standpoint, performs the hybrid administrative-professional role of clerk of the court and law clerk to the judges.

The Registrar appears to be a particularly key official in the Court's work because the Court does not in fact sit with a fixed membership. All thirty-seven judges of the Queen's Bench Division are designated by statute as Criminal Appeal judges and ordinarily only three of them actually sit at a time. The Lord Chief Justice usually presides. Thus he and the Registrar are the only two officials constantly concerned with the Court's total business. With the Lord Chief Justice, however, the criminal appeals are only part of his work. By necessity, therefore, he and the other judges rely heavily on the Registrar for advice and to keep the machinery operating.

One of the most important aspects of the work of the Criminal Appeal Office is the preparation of what are called summaries. A summary, which is for the use of the judges only, is prepared after the application for leave to appeal and the papers from the trial court are all assembled. If the application is to be referred initially to a single judge, under the procedure described below, a summary is not usually written at that point. However, a summary is prepared in every case which goes before the full court, either initially or after refusal by a single judge. It is a fairly brief document, typically one to three pages of double spaced typing, which contains a distillation of the facts relevant to the sentencing issue and also the appellant's reasons for seeking review of the sentence. It may contain a citation or two and some comment on any legal point which may be involved. However, it contains no recommendations as to what the Court ought to do. A careful effort is made to keep it a completely objective abstract. If there is really a substantial point presented, the Registrar usually takes the application personally to the Lord Chief Justice. The judges appear to think that the summary is a valuable aid. It ensures that the record is complete, in addition to providing a handy capsule of the case. It may not be too much to say that as presently constituted the Court of Criminal Appeal could not handle the volume of appeals which it gets without these summaries.

Preparing summaries is the job of five professional staff members in the Criminal Appeal Office. The volume has increased to such an extent, however, that it has become necessary to farm out much of this work to barristers in

³The Criminal Appeal Act, 1907, § 8, requires that the trial judge furnish the Registrar with his notes and with a report giving his opinion. In practice now the "short transcript" serves this purpose, and CCA rarely calls for such a report. Donovan Report 60-61. It would do so only in some unusual situation such as the death of the shorthand writer (i.e., the court reporter).

private practice who do it on a daily fee basis. Summaries are prepared in this manner, outside the Criminal Appeal Office, in over half of all the cases. This practice was criticized in the recent Donovan Report, and it was recommended that the professional staff be increased so that all the work can be handled within the office.⁴

2. The single judge screening procedure

The Criminal Appeal Act provides that the power of the Court to grant leave to appeal may be exercised by any judge of the Court. In practice most applications for leave to appeal only against sentence (and not conviction) are routinely put first before a single judge. In contrast, most applications for leave to appeal against conviction go initially before "the full court," which means a bench of three judges. Several hundred of these also seek leave against sentence as well. Out of the 1,500 to 2,000 annual applications for leave to appeal solely against sentence, approximately 100 to 150 go initially to the full court. These are cases in which either a solicitor has been privately retained by the appellant, or there is some reason for expedition such as a short sentence which will soon expire, or there is some peculiar or difficult feature such as an unusually long sentence. But the great mass of applications are filed by unrepresented prisoners, and they are processed through the "single judge procedure," as it is called. This is all a matter of internal court administration. The practice is not governed by statute.

Applications referred to a single judge are considered by him privately in his chambers. The appellant himself is never present at this stage, and no representative of the prosecution appears. Indeed the prosecution puts in no appearance and files no paper at any stage of sentencing review in the Court of Criminal Appeal. The appellant may engage counsel to appeal for him on his application, but when it is made known that counsel will appear the application is referred to the full court, even though it would otherwise have gone to a single judge. Appearances before the single judge are few and usually occur only in connection with an application for bail.

After reviewing the papers (there is usually no summary at this point) the single judge simply notes on a form whether leave to appeal is granted or denied. He gives no reasons. If leave is granted, the appeal is set down for a hearing before the full court, a proceeding to be discussed later. If leave is denied, the prisoner is so informed and is also informed that he may, within five days, renew the application before the full court. In other words, he gets an appeal as a matter of right from the single judge's denial.⁵

From January 1 to October 1, 1965, there were 1,026 applications for leave to appeal against sentence which were referred initially to a single judge. The following table shows their fate.⁶

1,026 SENTENCE APPLICATIONS REFERRED INITIALLY TO
SINGLE JUDGE. JAN. 1-OCT. 1, 1965

Leave to appeal granted -----	75
Leave to appeal refused -----	951
Application abandoned after refusal -----	430
Application renewed before full court after refusal by single judge -----	520

These figures tend to bear out the findings of the Donovan Committee that the single judge procedure results in grants of leave to appeal sentences in about 7% of the cases.⁷ As a table elsewhere in this report shows, of all applications for leave to appeal against sentence in 1964, 9.5% were granted in one way or the other. Assuming this is a typical pattern, the conclusion is that close to three-fourths of the grants of leave for sentence review come out of the single judge procedure and another one-fourth from action of the full court.

The Donovan Report also found that in about 60% of the applications refused by a single judge, the appellant presses the matter further.⁸ This means

⁴ Donovan Report 67.

⁵ This is done on a form furnished to the prisoner by the Criminal Appeal Office along with the notification of the refusal of leave.

⁶ These figures were furnished by the Registrar.

⁷ Donovan Report 54. No change was recommended in the single judge procedure by the Donovan Committee.

⁸ Donovan Report 54.

that the single judge screening device disposes of upwards of 40% of all the applications. Of those which are renewed before the full court, the single judge is reversed and leave to appeal granted in about one out of fifty.

These data suggest that the single judges, in their individual rulings, are acting in a fairly high degree of harmony with the various and shifting three-judge panels which make up the "full court." And this is undoubtedly so. In fact, there is what might be referred to as a "hard core" of some six to ten Queen's Bench judges who sit fairly regularly on CCA, and each of these is quite aware of the others' attitudes on sentences. One of these judges can pass quickly on an application, as he has a feel for the Court's reaction to the combination of factors in each case. If no legal question is presented, no sentencing principle clearly violated, and the sentence falls within the allowable range (as seen collectively by CCA judges), leave is denied. Those familiar with the Court's work believe that the screening provided by single judge procedure is useful and efficient.

3. Applications considered by the full court

Applications for leave to appeal against sentence which are acted on by the full, three-judge bench are handled the same whether they are initially referred to the full court or are renewed after refusal by the single judge.

The Court sits one or more days a week for the purpose of disposing of the applications. For a given day there are typically about twenty applications on the list. Several days beforehand the Registrar distributes to the three judges who will constitute the Court for that day the papers in the cases. Each judge gets a complete file in each case, including the summary. He will go through all the files before the Court meets, presumably with varying degrees of time consumption, depending on the complexity of the case and his own *modus operandi*. The summaries appear to be relied upon heavily, although they are not viewed as a substitute for the actual papers. At the time the papers are distributed, one of the three judges is designated to announce the Court's decision. In most cases no conference is held. But if there is any point of difficulty the judges may confer with each other beforehand.

When the full court then convenes for its public session the applications are called one by one from the printed list for the day. As each is called, the judge designated to announce the disposition, if there has been no previous conference, will glance at his two colleagues to determine whether either has any difficulty with the case. If not, leave will be denied. If necessary a brief conference is held on the bench. The judge then makes an oral statement reciting briefly the circumstances of the offence and considerations which went into the sentence, drawing from sources such as the antecedents, the probation report, and the explanation given by the trial judge. If leave to appeal is being denied, the oral statement usually ends with the conclusion that the Court sees no reason to disturb the sentence. There may be some indication that for certain specific reasons the Court thinks the sentence is appropriate. If leave is being granted, some brief indication may be given as to why the Court wants to hear the appeal. Occasionally in the past if the Court felt quite clear about the matter, it would grant leave and at the same time order the sentence reduced or altered without any further hearing. This appears to be done now only if counsel for the appellant is present in court and consents. However, the Court would never increase a sentence summarily in this fashion.

The existence of the power to increase sentences has had an effect on the practice of explaining why leave was being granted. Some years ago reasons were customarily announced. When it appeared that the Court was granting leave because it was of a mind to increase the sentence, the appeal would be abandoned by the prisoner, thereby defeating at least part of the purpose of the power to increase. So the Court stopped giving any reasons for grant of leave. That did not fully prevent such abandonment, however, as the Court nearly always saw to it that the appellant was provided counsel for the hearing of the appeal, when the Court was thinking of increasing sentence: counsel would often sense the Court's attitude and advise that the appeal be dropped. Now that the Donovan Report has recommended that the power to increase should be abolished, and the Court has in practice stopped increasing sentences, reasons for granting leave to appeal are usually stated. A discussion of the power to increase and the Donovan Committee's views appears later in this report.

The accompanying table shows statistically the sentencing review business of the Court of Criminal Appeal for the calendar year 1964. These figures are reasonably representative of the pattern for the past few years, though percentages would vary a few points from one year to another.

The figures show that conditioning an appeal on leave of court does serve to reduce substantially the volume of full-dress sentencing review which the Court has to undertake. There appears to be no real sentiment among informed observers in England for making appellate review of sentences a matter of right, at least not at the CCA level. But, as may be clear from the foregoing discussion, the procedure for passing on the applications gives a substantial measure of appellate review to a sentence even though leave to appeal is formally denied.

IN THE COURT OF CRIMINAL APPEAL, 1964

Application for Leave To Appeal

Total	Against conviction	Against sentence	Against conviction and sentence	Disposition of applications		
				Abandoned	Refused	Granted
2,699	515	1,704	480	1,010	1,338	351

Note: 20,397 persons were adjudged guilty in 1964 in the assizes and quarter sessions.

APPLICATIONS FOR LEAVE TO APPEAL AGAINST SENTENCE

Total	Leave granted	Result of appeal after leave granted		
		Sentences affirmed	Other sentences substituted	Sentences quashed
2,184	208	73	125	10

APPLICATIONS FOR LEGAL AID

Total	Abandoned	Applications considered by CCA		
		Total	Granted	Refused
2,343	242	2,101	335	1,766

SUMMARY IN PERCENTAGES*

Percentage of all appellate applications in which sentence was attacked..	80
Percentage of sentence applications in which leave to appeal was granted..	9.5
Percentage of sentence applications in which sentence was quashed or altered.....	6.1
Percentage of sentence appeals (after leave granted) in which sentence was quashed or altered.....	65

*This information has been compiled from *Criminal Statistics, 1964*, an annual publication of the Home Office.

4. Proceedings after leave to appeal against sentence is granted

For the past several years, approximately 2,000 applications seeking review of sentences have been filed annually. The leave procedure, involving both the single judge and the full court, disposes of something on the order of 90% of these. The remaining cases in which leave is granted—some 200 more or less—become “appeals,” instead of mere applications for leave. How an “appeal” is handled will now be described.

When leave to appeal is granted the case is set down on an appeals list for a day certain. There is no great lapse of time. Indeed one striking characteris-

tic of the whole English criminal process, compared to that in the United States, is the expedition, as well as fairness, with which it moves. A sentence appeal might be disposed of in the Court of Criminal Appeal at something like ten weeks after sentence was imposed in the trial court; normally the interval would not be over three months. On a typical day the Court might hear and decide from eight to twelve appeals against sentence.

As is true in all English appellate practice, there are no written briefs filed with the Court. For the appeal itself the Court has only those papers which were before it on the application for leave. The nearest thing to a written argument is the narrative statement of reasons for seeking review, written in the application form by the prisoner himself in most cases. At the hearing of the appeal, however, the appellant is represented by counsel in the majority of cases, and counsel makes the oral presentation on his behalf. The appellant is given the right to be present in person and is in fact present in most cases. The hearing takes place in open court, before a bench of three judges, one of them nearly always being the Lord Chief Justice.

When the case is called, counsel for the appellant rises and presents an argument. This may vary in length from three or four minutes to ten or fifteen minutes. Rarely will it be longer, although no stated time limit is imposed. Counsel will attempt to develop a theory which will persuade the court that the sentence should be altered in some way. He may argue for probation instead of imprisonment, for concurrent instead of consecutive sentences, or simply for a shorter term. Often he will develop an argument that the sentence was imposed on an erroneous premise or on mistaken principle: in theory, this is the main basis on which the court will disturb a sentence.

In the typical sentence appeal the oral statement and argument of appellant's counsel will constitute the entire hearing. Witnesses may be called to testify, however, if counsel thinks that desirable and if the court thinks it would be helpful to hear them. But this is not often done. New information can be put before the Court as part of counsel's argument, as it is in the trial court during the original sentencing process. In a sentence appeal observed in a larceny case, for example, counsel stated that the appellant planned to repay the money he had taken and that this was a fact not made known to the trial judge. Sometimes where a probation officer's investigations had not been made at the time of trial, a report will be available for the first time on the appeal. Medical and psychiatric reports might also have been prepared since the trial, and these can be put before the Court. In practice, probation and medical reports are the most often encountered sorts of new information brought in on the appeal. A prison or borstal report is sometimes submitted for the appeal, giving on account of the appellant's behavior and response to treatment since trial.⁹

The hearing of the appeal is characteristically informal. It is not really a hearing *de novo*, yet new matter outside the record can be offered freely. The rules of evidence seem to be of no concern, as is true of the sentencing process at the trial level. The Court is interested in assessing the information it can then get. Since no more than three months will usually have elapsed since trial, it is not often, except perhaps in borstal training cases, that circumstances will have changed sufficiently to affect the appropriateness of the sentence. But they may have, and, in any event the appellate court wants all the help it can get on the sentencing question, as distinguished from a review of the conviction, which is strictly on the trial record with the single exception of "fresh evidence" on the issue of guilt.

As mentioned before, the prosecution takes no part in a sentence appeal. No counsel representing the prosecution is even present in court. This differs from sentencing review in Quarter Sessions where counsel for the prosecution is always present to present the facts.

At the conclusion of the presentation for the appellant, the three judges generally huddle for a few minutes without retiring from the bench. Then one of them delivers the judgment. What is spoken of as the "judgment" in English appellate courts would be called the "opinion" in the United States. This is an oral statement, often of fairly substantial length, recapping the relevant circumstances of the case and giving the Court's conclusion as to whether the

⁹ See the references in the Court's judgment in *Hunt*, Meador Report Appendix 3, *infra*.

sentence should be disturbed. (See the judgment in *Hunt*, Meador Report Appendix 3, *infra*.) This is similar to the oral statement delivered from the bench when the full court acts on an application for leave to appeal against sentence. One gets the impression that the summary prepared in the Criminal Appeal Office is relied on heavily on both occasions. But of course in deciding the appeal itself the Court will have heard counsel, and possibly new information, and the judgment usually takes this into account.

If the sentence is affirmed, the "appeal is dismissed." Otherwise the Court makes the order it deems appropriate—*e.g.*, that the sentence be quashed or that it be modified in certain respects or that some other sentence be substituted. The appeal is disposed of entirely and finally on the day that it is heard. Rarely would the Court reserve decision to a later day, and it delivers no written opinions.

A "short-hand writer" is present in court and makes a verbatim report of the orally delivered judgment. Some of the Court's judgments (*i.e.*, opinions) are later printed in the *Criminal Appeal Reports*, and summarizations of perhaps two out of twenty appear in *The Times* (a London daily newspaper) the day after their delivery. But most of them go unreported. A monthly periodical, *The Criminal Law Review*, carries one paragraph extracts in every issue of a dozen or more recent sentencing decisions under the title, "Principles of Punishment."

It might be helpful to summarize here the most significant differences between sentence review procedure in the Court of Criminal Appeal and such procedure in the Quarter Sessions: (1) appeal to QS in a matter of right, whereas leave must be obtained for appeal to CCA; (2) appeal against conviction only in QS opens up the sentence to review, but it does not do so in CCA; (3) in QS there is no record from below on a sentence appeal and the hearing is *de novo*, while in CCA there is a record from below, the hearings is not *de novo*, but new information is received; (4) in QS prosecution counsel is present and presents the facts, but in CCA prosecution counsel is not present; (5) at least some CCA opinions on sentences are reported, but no QS decisions are reported.

5. Bases for decision—sentencing policy

Almost no principles of sentencing review are legislatively prescribed. The Criminal Appeal Act simply states that "On an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed. . . ." Thus the leeway in substituting for the trial court's decision any sentence that the appellate judges "think ought to have been passed" is limited statutorily only by the requirement that the sentence be legally warranted by the verdict. But in practice the Court purports not simply to substitute its notion of the appropriate sentence for that of the trial judge. The Court says it will not "tinker" with sentences. For example, twelve months' imprisonment will not be reduced to nine months even though the latter is thought proper and is what would have been imposed if the appeals judges had been presiding at the trial.¹⁰ The Court has stated its policy thus: "It is only when a sentence appears to err in principle that the Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles, then this Court will intervene."¹¹

This statement suggests that there are some ascertainable principles of sentencing which the Court can articulate and by which it judges the sentences brought before it for review. A full-scale analysis of such sentencing principles and policies as the Court may have invoked or formulated has been regarded as beyond the scope of this report. This reporter's investigations, directed chiefly to the mechanics of sentencing and sentencing review, have been pursued empirically by observing proceedings, studying papers in actual cases, and talking with persons who actively participate in the process. No comprehensive study of the opinions of the Court of Criminal Appeal bearing on sentencing theory has been undertaken. This would be a substantial project in itself.

¹⁰ Donovan Report 42.

¹¹ R. v. Ball, 35 Cr. App. R. 164.

Even among scholars in the field of criminal law in England, sentencing is a subject which has only recently begun to receive serious attention.

For this study of appellate review of sentencing, theories of sentencing have been inquired into only in a very limited way for the purpose of determining to what extent, if at all, the machinery for review may contribute to the formulation of sentencing policy, which in turn governs the exercise of the review power and guides the trial courts. One might suppose that if appellate review produces coherent sentencing theory which gives guidance to the trial courts, that may be a good reason why such review is desirable. On the other hand, if appellate review does not produce this, and is exercised without regard to rational policy, then it must be justified on other grounds.

In an article published last year by a serious student of the CCA and sentencing generally, the Court's opinions were examined in light of five possible theories of sentencing: (1) retributive or denunciatory, (2) general deterrence, (3) specific deterrence, (4) preventive, (5) rehabilitative. The author concluded that "The position of the court is balanced between the competing claims of the traditional ideas of punishment on a culpability or deterrent basis and more modern ideas of rehabilitative treatment."¹² Another scholar has discovered at least twenty-five different categories of consideration which the court has applied from time to time in the reassessment of sentences.¹³

One way of testing pragmatically whether the Court has shaped sentencing policy through reviewing sentences is to ask judges of the lower courts whether they feel that they get any guidance from the Court of Criminal Appeal. This question tended to draw a mixed and inconclusive response. Several recorders and chairmen of Quarter Sessions did say that in arriving at a sentence they were aware of little or no helpful direction, other than some notion as to the length of imprisonment which the Court would consider excessive. There was some opinion that the policing of excessive sentences—"knocking off the peaks"—is really all that an appellate court can do. One said that whether a particular sentence was upheld depended on which three judges happened to constitute the Court and that inconsistent decisions were sometimes rendered by different panels. That view is corroborated by one writer on the subject who says that unless a sentence is contrary to statute or some clear pronouncement in an earlier case, "it is difficult to discover what are the principles of punishment. For the most part our courts seem to impose sentence by a process dependent upon experience of what this sort of criminal, in circumstances of this kind, on this sort of charge usually gets—that and intuition. It necessarily follows that the question whether a particular sentence is excessive can be gauged by no better yardstick."¹⁴

Another student of the Court, however, disagrees with those views and attributes them to a failure of communication. He believes that there are discernible patterns and policies in the Court of Criminal Appeal's sentencing decisions but that these are not gotten across very well to the Quarter Sessions, largely because many of the Court's opinions on sentences are not reported and not studied. There is also a view that the sentencing policies formulated by the Court do find their way subtly into the judicial atmosphere and that the policy guidance provided by the Court is significant but is something of which Quarter Sessions are not consciously aware. The Queen's Bench judges who preside at criminal trials in the Assizes register more awareness of sentencing principles (real or imagined) stemming from the Court of Criminal Appeal, as indeed they should, because they sit on the Court themselves from time to time and associate in the High Court with the other CCA judges. A similar situation exists on those Quarter Sessions courts which happen to have a Queen's Bench judge as chairman.

The published evidence of the attention which university law teachers are beginning to give to sentencing,¹⁵ as well as a quick sampling of CCA opinions, shows that the CCA has in fact enunciated and followed numerous sentencing principles over the years. A few illustrations may be cited out of the hundreds

¹² Thomas, *Theories of Punishment in the Court of Criminal Appeal*, 27 *Modern Law Review* 546, 566 (1964).

¹³ Davies, *The Court of Criminal Appeal: The First Forty Years*, 1 *J. Soc. P.T.L. (N.S.)* 425, 435 (1951).

¹⁴ Napley, *The Court of Criminal Appeal: The Functions of an Instructing Solicitor*, 61 *The Law Society's Gazette* 307, 310 (1964).

¹⁵ See the articles cited in the bibliography in Meador Report Appendix 5.

of cases. The Court has held, for example, that it is wrong in principle to impose a heavier sentence on a defendant because of his misconduct at the trial.¹⁶ The Court seems to have established the principle that a "professional" in certain criminal activity is to get a heavier sentence than a person committing a similar offence on an isolated occasion as the result of peculiar pressures.¹⁷ And in a case observed, the court substituted a conditional discharge for a fine where the fine had been imposed on defendant with the intention of the Court that it be paid by his employer; it was wrong in principle, CCA said, to sentence on this basis.¹⁸ As suggested above, the inadequate communicating of such decisions as these to the trial level throughout the country may be responsible for some of the feeling of lack of policy guidance.

Incidentally, the last example also illustrates the importance to appellate review of the trial judge's stating reasons for his sentence. For had the trial judge not explained that the fine was being imposed with the intention of getting at the employer instead of the defendant, there would have been no ground for interfering with the sentence. If meaningful review is to be undertaken, it seems essential that explanations for sentences be given for the record in the trial court.¹⁹

The trial court is deprived of potentially valuable assistance on the sentencing question because of the limited role of prosecution counsel. It is thought improper for the prosecution even to cite cases to the court, unless perhaps they are distinctly favorable to the accused. So even if there be an articulated sentencing principle in the CCA opinions, counsel for the prosecution cannot in any manner inform the court of it, though of course defense counsel could if he were aware of the cases.

The conclusion derived from this cursory inquiry is that the case law generated by sentencing review does produce a number of principles of sentencing, some of which feed into the climate surrounding the sentencing process and all of which could be ascertained more concretely if one studied all of the Court's opinions, reported and unreported. One writer has said of the Court: "It is submitted that by its decisions week by week, month by month, and year by year, it is slowly and steadily building up a criminal jurisprudence of sentencing of which we in this country can be moderately proud."²⁰

In addition to altering a sentence because it is contrary to "right principles," the Court may squash a sentence because statutorily prescribed procedures were not followed in imposing it. Perhaps the best example is preventive detention where the statute spells out certain steps which must be taken in the trial court before an order for such custody can be entered. This ground of review is not available generally because the procedures for sentencing in most cases are not prescribed with such particularity. Moreover, failure to follow a certain procedure might be cured in CCA where the defendant can freely offer matter not put before the trial court.

The handling of trial court irregularities is no doubt affected by the Court's lack of power to remand a sentence appeal. CCA must make final disposition of the sentence; there is no such thing as sending the case back for further proceedings or re-sentencing. This means, for example, that, apart from a special case such as preventive detention, a sentence would not be set aside merely because the Court thought that the trial judge had acted on inadequate information or had not conducted the hearing as he should; the Court would simply receive the information itself and determine on this basis whether the sentence should stand. This lack of power to remand is characteristic of the English criminal process. There is no concept, for example, of a reversal of a conviction and remand for new trial in the American sense because of the trial judge's erroneous rulings. The Court of Criminal Appeal can only quash the conviction, thereby freeing the accused outright. Last year, for the first time the Court of Criminal Appeal was given authority to order a new trial in one circumstance only—where there is "fresh evidence" bearing on the issue of guilt.

¹⁶ R. v. Aston [1948] W.N. 252.

¹⁷ See Thomas, Sentencing Co-defendants—When is Uniform Treatment Necessary?, 1964 Crim. L.R. 22, 27.

¹⁸ Alan George Niel, No. 1561, CCA, Oct. 25, 1965.

¹⁹ In support of this idea, see Cross, Paradoxes in Prison Sentences, 81 L.O.R. 205 (1965); Thomas, Sentencing—The Case for Reasoned Decisions, 1963 Crim. L. R. 243.

²⁰ J. E. Hall Williams, The Sentencing Policy in the Court of Criminal Appeal, 10 The Howard Journal 201, 211 (1960).

Though a sentence which CCA deems excessive might sometimes be explained to be "wrong in principle," one gets the impression that often excessiveness is in itself a ground for modifying a sentence. In other words, without bothering with "principle," the sentence might be viewed by the Court as exceeding the norm of "tariff" or pattern established by the Court for the particular offence and circumstances. Virtually every person with whom the subject was discussed sees this kind of review as the major and most salutary feature of appellate review of sentences. Because of the volume of appeals and the long years of review, there is now a norm for almost every offence and every combination of circumstances. To some extent, the norm is more a matter of "feel" on the part of the CCA judges than it is an articulated proposition. It is not rigid for a given situation: it is a kind of judicial consensus for an allowable range. For example, in a case of robbery with violence involving an adult male with no prior convictions, property of moderate value and no extraordinary circumstances, the norm might be one to two years' imprisonment (this is purely an imaginary illustration and does not purport to be the actual norm with the Court in this sort of case). This means that if the trial court sentence were one year or fifteen months or eighteen months or two years it would be upheld. All these are within the range, and the Court will not "tinker" with sentences. But a sentence of three years or more would probably be reduced. And of course, any peculiar twists to the facts of unusual medical or probation information might alter the norm.

The *Hunt* case (Meador Report Appendix 3, *infra*) is unusual, as the Court would rarely substitute probation for a four-year term of imprisonment.

English lawyers and judges find it odd that the question whether sentences should be subject to appellate review is a matter of debate in the United States. The time before which CCA was established with authority to review sentences lies beyond the memory of the active members of the English legal profession today; they have never known another system. So to them sentencing review is taken for granted. In addition, though, everyone consulted believes it is to be a good thing. Most think its chief virtue is that it serves as a protection against erratic sentences, the occasional peaks of excessiveness. A number of thoughtful persons also believe that it contributes greatly to sentencing policy and to an improved atmosphere for the sentencing process.

EXHIBIT 2

APPELLATE REVIEW OF SENTENCES AND THE
DEVELOPMENT OF SENTENCING POLICY:
THE ENGLISH EXPERIENCE

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Appellate Review of Sentences and the Development of Sentencing Policy: The English Experience

*D. A. Thomas**

A major issue running through discussions of the desirability of appellate review of sentences is the extent to which an appellate court can through its decisions develop coherent policies to govern the exercise of the wide discretion typically given to the trial judge in the sentencing function. The development of an extensive caselaw of sentencing is seen by some observers as a means of controlling this discretion while preserving sufficient flexibility to deal with the infinite variations of circumstances found in individual cases. It is preferred for this reason to a system of detailed statutory regulation employing rigid criteria and tending as a consequence to produce distortion of the total criminal process as steps are taken to avoid the application of those criteria in particular cases. Against this view it is argued that review of sentences has not in fact produced any meaningful guidance for trial judges in those jurisdictions where it is available. Reference is made in support of this position to studies of the caselaw produced in those jurisdictions which generally conclude that appellate review has not made any significant contribution in this respect, and further support is found in similar conclusions reached by some observers of sentencing

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in England where sentence review has been available for over sixty years.¹

It is proposed in this article to argue in favour of the former position and to demonstrate that appellate review of sentences in England has in fact led to the development of a complex and coherent body of sentencing principles and policy which significantly influences sentencing at the trial level. It is not contended that English practice is beyond improvement, and no position is taken in respect of the content of the policies developed by the English court.

SENTENCING IN ENGLAND

The Statutes

The statutory framework of sentencing in England exhibits features found in many state systems in the United States but is in some important respects untypical of the American pattern.² England has no criminal code and except in a few contexts³ there is no legislative guidance on fundamental issues of penal policy in so far as they effect the sentencing decision. The courts are provided with a choice between punitive measures, typically imprisonment, and a range of measures embodying the concept of individualisation; this range includes probation, conditional or absolute discharge, the suspended sentence, commitment to a mental hospital, and several forms of custodial training sentence for the young offender.⁴ A significant feature of the system is the absence of provisions excluding the use of probation or other individualised measures in particular cases, except in the instance of murder (for which the only sentence possible is the indefinite sentence of life imprisonment) and three rare offences for which by an accident of legislative history the death penalty is retained.⁵ The sentencer has a free

1. For a selected bibliography on appellate reviews of sentences, see ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES Appendix D (Tent. Draft 1967). More recent articles include Halperin, *Sentence Reviews in Maine, Comparisons and Comments*, 18 MAINE L. REV. 133 (1966); Weigel, *Appellate Review of Sentences: To Make the Punishment Fit the Crime*, 20 STAN. L. REV. 405 (1968).

2. For a description of English criminal courts and sentencing procedures, see D. KARLEN, *ANGLO-AMERICAN CRIMINAL JUSTICE* (1967); ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES Appendix C (Tent. Draft 1967) [hereinafter cited as MEADOR REPORT].

3. See Children and Young Persons Act, 1933, 23 Geo. 5, c. 12, § 44(1), which requires courts to "have regard to the welfare" of persons under seventeen.

4. For details of these sentences, see HOME OFFICE, *THE SENTENCE OF THE COURT: A HANDBOOK FOR COURTS ON THE TREATMENT OF OFFENDERS* (1964). The law as stated in this booklet has been changed in some details by the Criminal Justice Act 1967, c. 80.

5. The offences are treason, piracy with violence, and arson in a naval dockyard.

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choice between a sentence of imprisonment and one of the various individualised measures. If the choice is for a sentence of imprisonment the sentencer again has a wide discretion; mandatory minimum sentences are unknown (except in the case of murder) and the maximum penalties fixed in the various statutes creating offences are for the most part so much higher than what is normally considered appropriate for those offences that the process of fixing the length of imprisonment seldom involves any consideration of the statutory provision. Similarly the statutory conditions of eligibility for most of the individualised sentences (the principal exception is committal to a mental hospital)⁶ are defined so loosely as to leave the decision to use them, as opposed to imprisonment, and the choice between one individualised measure and another, entirely to the discretion of the sentencer.⁷

The indeterminate sentence, one device used in part to limit the scope of judicial discretion in the United States, has played only a small role in sentencing in England up to the present time. Until recently indeterminacy was found only in individualised measures and life imprisonment; sentences of imprisonment were for a fixed term of years, from which the offender was entitled to one third remission for good behaviour. Recent legislation⁸ has provided for a system of parole which will become effective during the summer of 1968. Under this system a prisoner sentenced to imprisonment for a fixed term becomes eligible for consideration for release on license when he has served one third of his sentence; if he is released he remains on license until the time when the sentence (allowing for remission) would normally expire, at which time his release becomes absolute. A complex structure of advisory committees has been established to supervise the operation of the release procedure, but the key decisions are firmly in the hands of the Home Office, a department of the central government. While it is

6. Mental Health Act, 1959, 7 & 8 Eliz. 2, c. 72, § 60. This section requires that two medical practitioners must state that the offender is suffering from one of the mental disorders defined in the Act, and that his condition warrants his detention in hospital for treatment. For a discussion of the use of this power, see Thomas, *Sentencing the Mentally Disturbed Offender*, [1965] CRIM. L. REV. (Eng.) 685.

7. Thus a probation order may be made in case of a person convicted of any offence other than murder if the court is "of opinion that having regard to the circumstances, including the nature of the offence and the character of the offender, it is expedient to do so." Criminal Justice Act, 1948, 11 & 12 Geo. 6, c. 58, § 3(1). A sentence of Borstal training may be imposed on a youth within the prescribed age limits and convicted of an offence punishable with imprisonment where the court is "of opinion, having regard to the circumstances of the offence and after taking into account the offender's character and previous conduct, that it is expedient that he should be detained for training for not less than six months." Criminal Justice Act, 1961, 9 & 10 Eliz. 2, c. 39, § 1(2).

8. Criminal Justice Act 1967, c. 80, §§ 59-64.

not clear how the introduction of parole will affect the sentencing process, there seems little reason to suppose that it will change its major characteristics.⁹

The chief control on the wide discretion entrusted to sentencers in England is provided by the Court of Appeal (Criminal Division), known until 1966 as the Court of Criminal Appeal.¹⁰ This Court has jurisdiction to review (on the application of the offender) sentences passed on all persons convicted before courts of assizes and quarter sessions, and (with one minor exception) sentences passed by quarter sessions on persons convicted by magistrates' courts and committed for sentence.¹¹ The discretion of this Court corresponds in width to that given to the trial judge; it may intervene "if it considers that the appellant should be sentenced differently for any offence for which he was dealt with by the court below" and may quash the sentence passed and substitute for that sentence "such sentence . . . or order as it thinks appropriate for the case."¹² The only limitations on the power of the court to substitute a sentence are that the substituted sentence must be one which the trial court could have passed on the offender, and that the appellant must not be "more severely dealt with on appeal than he was dealt with by the court below."¹³ A further appeal on a point of law may be taken to the House of Lords, the highest judicial tribunal, but only one case directly involving a question of sentence has been dealt with by the House of Lords since the system was established in 1907.¹⁴

Review of sentences is the main business of the Court of Appeal (Criminal Division). In 1966, approximately 22,000 sentences were passed over which the Court had jurisdiction; applications for leave to appeal were made in 3,824 cases (17.4 percent) and in 204 cases the sentence was varied or quashed. There were 1,320 applications for leave to appeal against conviction, and 18 appeals against conviction by right, in the same period.¹⁵ Although the Court interfered with less than one

9. For a discussion of possible effects of the new Legislation, see Thomas, *The Criminal Justice Bill: New Issues in Sentencing Policy*, [1967] CRIM. L. REV. (Eng.) 277.

10. For a full description of the working of this court, see MEADOR REPORT.

11. Jurisdiction in respect of persons committed for sentence has been enlarged slightly since the *Meador Report* by Criminal Justice Act 1967, c. 80, § 97(3).

12. Criminal Justice Act 1967, c. 80, § 97(7), consolidating Criminal Appeal Act, 1907, 7 Edw. 7, c. 23, § 4(3), and Criminal Appeal Act 1966, c. 31, § 4(2).

13. Criminal Justice Act 1967, c. 80, § 97(7).

14. See *Verrier v. Director of Public Prosecutions*, [1966] 3 W.L.R. 924 (H.L.).

15. HOME OFFICE, CRIMINAL STATISTICS: ENGLAND AND WALES, 1966, CMND. No. 3332, at 122-32, 200-02 (1967).

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percent of the sentences which are subject to its jurisdiction, it is significant that one out of every six sentences was submitted for review.¹⁶

The Appellate Court

The statutory framework of sentencing, leaving wide discretion to the trial judge and the appellate court, and the substantial number of cases considered by the Court each year place the Court in a strong position to develop sentencing policies and to eradicate disparities in sentences occurring at trial level. The Court is clearly conscious of its policy making role, and will occasionally make detailed statements of sentencing policy in the form of a practice direction (a general statement made openly in court but not necessarily in the course of giving judgment in a case) where cases coming on appeal indicate that trial judges are experiencing difficulty with a particular type of case.¹⁷ Occasionally the Court's consciousness of its role as policy maker becomes explicit in other ways; in a recent case where a trial judge had departed from a well established norm, the Court, in varying the sentence so passed, indicated that such a departure should not have been made without prior consultation with the Court.¹⁸ Typically, however, the Court establishes policy not by dramatic declarations in isolated decisions but by regularly exhibiting the same approach to the same kind of case, and the policy may become evident more in the Court's actions than in its broad general statements. Although the Court gives a reasoned statement for every decision (including the dismissal of those applications heard by the full court as opposed to the single judge), it will discuss in detail the basic penal philosophy behind its determina-

16. The number of applications for leave to appeal has risen in the last few years. This increase probably reflects the restriction on the Court's power to increase a sentence effective from October 1965. See MEADOR REPORT 144; discussion in text accompanying notes 96-104 *infra*.

17. Most typically such practice directions concern the effect of recent legislation. For a recent example, see *Regina v. Gardiner*, [1967] 1 All E.R. 895, 897 (C.A. Crim. Div.) (dealing with the exercise of powers to commit offenders to mental hospital under the Mental Health Act, 1959, 7 & 8 Eliz. 2, c. 72, §§ 60-80).

18. *Regina v. Lavin* (No. 1069/67, C.A. Crim. Div., May 30, 1967). See also *Regina v. Carter*, [1967] CRIM. L. REV. (Eng.) 716 (C.A. Crim. Div.), where the appellant was sentenced on two indictments to nine months' imprisonment for receiving and one month concurrent for bigamy, and appealed against the sentence of nine months' imprisonment only. The Court accordingly could not interfere with the sentence for bigamy (as a result of the most recent legislation it would be free to consider the sentence but could not increase it beyond the total sentence passed by the trial court). The Court took the opportunity to state for the guidance of lower courts who had only recently been given jurisdiction to try cases of bigamy, previously reserved for assizes, that where the offence of bigamy involved deception of the woman involved, a sentence in the region of eighteen months' imprisonment should be considered appropriate.

tion only where the case is such as to cause the Court to approach the matter from first principles; that is, only in the case presenting unusual features.¹⁹ In dealing with the more common kind of case the Court tends to assume the existence of the norms it has established, and to discuss in its judgment the facts of the case in relation to those norms, without necessarily identifying the norms specifically. The typical individual judgment seldom contains more rationalisation than those of the Connecticut Review Division, which one writer has found inadequate for the purpose of developing statewide sentencing principles.²⁰ For this reason an individual decision taken in isolation and minutely analysed will not shed much light on the Court's approach to sentencing generally; to grasp this it is necessary to take an overview of a substantial number of decisions, when the Court's policies can be seen in sharp relief. It is not possible in the scope of an article to give a complete account of the Court's sentencing policies, but it is possible to illustrate some of the different contexts in which the Court has developed policies or principles, and to consider the effect of the Court's existence on sentencing at the trial level in England.

The Procedure of Sentencing

Procedural aspects of sentencing make a convenient starting point. Although there exists a significant body of legislation in this area, much is left to judicial discretion. Provision is made for pre-sentence reports to be prepared,²¹ and the vexed question of the confidentiality of pre-sentence reports has long been determined by statute in favour of disclosure,²² but the basic question of whether a pre-sentence report should be obtained and considered in a given case is left to the discretion of the court.²³ A similar position prevails in the context of representation;

19. See, e.g., *Regina v. Llewellyn-Jones*, 51 Cr. App. 204 (1967). The appellant, the registrar of a county court (a local court dealing with smaller civil cases) was convicted of a number of counts of fraudulently using funds under the control of the court for his own purposes and sentenced to four years' imprisonment. It was argued that such a sentence could not be justified as a deterrent, as behaviour of this kind was extremely rare. The Court upheld the sentence, explaining it in frankly retributive terms: "This is not a deterrent sentence; it is a sentence which is fully merited, in the opinion of this court, as punishment for grave offences and as expressing the revulsion of the public to the whole circumstances of the case."

20. See Note, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 YALE L.J. 1453 (1960).

21. See Home Office Circular 138/63, based on the recommendations of the Streatfeild Committee, contained in INTERDEPARTMENTAL COMMITTEE ON THE BUSINESS OF THE CRIMINAL COURT REPORT, CMND. No. 1289 (1960).

22. See Criminal Justice Act, 1948, 11 & 12 Geo. 6, c. 58, § 43.

23. A provision was included in the Criminal Justice Act 1967, c. 80, § 57, which

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a complex body of legislation empowers the courts to grant legal aid to accused persons, whether or not there is a plea of not guilty, but the decision to grant legal aid to a particular accused person is substantially a matter within the decision of the court.²⁴ In both of these areas, the impact of the Court of Appeal on the use of the discretionary power by trial courts has been significant. The Court has repeatedly emphasized that pre-sentence reports should be obtained in any case where there is a possibility of a probation order or similar disposal, and has taken a similar position in regard to the provision of legal aid, stressing that representation is as important to the defendant pleading guilty as to the person contesting the issue. Trial courts failing to make what the Court considers a proper use of these powers have been criticised in strong terms, despite the English convention requiring the use of extravagantly courteous language in all judicial matters.²⁵ Where a trial court has improperly failed to obtain a pre-sentence report, or to grant legal aid, the Court will normally give leave to appeal as a matter of course and reconsider the sentence having first obtained the necessary report and heard counsel appointed on behalf of the appellant.

Other Areas of Judicial Policy-Making

While these contributions of the Court to the procedural area are probably the most important in terms of their impact on the quality of sentencing at trial level, they do not illustrate the capacity of appellate review to develop relatively sophisticated policies of sentencing. Some evidence of this is present in the area of sentence concessions for those pleading guilty, and in the principles controlling the use of consecutive sentences.

Sentence Concessions for Those Pleading Guilty.—The negotiated plea, or "plea-bargain," plays a much smaller part in English criminal adjudication than it does in the United States. It is doubtful if the average English criminal trial lawyer would understand the term

would authorise the Home Secretary to make rules requiring courts to obtain pre-sentence reports in specified classes of cases: this provision is however not in force and accordingly no rules have been made under it.

24. See generally Criminal Justice Act 1967, c. 80, §§ 73-84.

25. Thus in a recent case where an offender who pleaded guilty was not given counsel to make a plea in mitigation, the Court stated that "this court has kept on saying that, when a serious sentence is in mind, accused persons must be given legal aid" and that the eventual sentence of two years' imprisonment was "a preposterous one." The sentence was varied to a probation order. See *Regina v. Brooksbank*, [1968] CRIM. L. REV. (Eng.) 280 (C.A. Crim. Div.).

(although he might well recognize the phenomenon when it was described). While no full-scale study of the matter has been undertaken it is possible to speculate why this difference exists. The prime reason is probably that English trial courts are not under the same degree of pressure of numbers as some American courts; although there is considerable pressure in courts in large urban areas, delays before trial would seldom exceed four months except in unusual circumstances. A second significant reason is the absence from English practice of a public prosecutor, and the consequential diffusion of responsibility for the management of the prosecution between the police force involved, the prosecuting solicitor retained by the police force, and the barrister instructed to handle the case in court; it is far from clear who would have authority to enter negotiations. A third factor is the different role of the prosecutor in the sentencing process in England; beyond formally calling evidence of the offender's record (and where there has been a plea of guilty, briefly summarizing the prosecution evidence), the prosecuting counsel takes no part in the sentencing process unless invited to assist on some particular point by the trial judge. A specific sentencing recommendation by prosecuting counsel would almost certainly be considered unethical. The same would apply in lower courts where a barrister does not normally appear. Finally, mandatory minimum sentences are (with the exception mentioned earlier) unknown in England.

Although those factors in American practice which tend to encourage the negotiated plea are either absent or significantly diminished in England, the "plea-bargain" is not entirely unknown. Occasionally, a "plea-bargain" in the classic style will take place, involving a specific agreement on the part of the prosecution to reduce a charge (or more usually, to refrain from proceeding with the more serious of two charges) in return for a plea to the lesser charge; more common is what might be called the "implied plea-bargain," where the prosecution prefers an indictment containing a greater and a lesser charge relating to the same facts, and elects not to proceed on the greater charge when the accused admits the lesser; here there will be no prior negotiation, but the experienced advocate will be able to read between the lines of the indictment. A third variation occurs where the defense counsel privately asks the judge for some indication of what sentence is likely to be passed, prior to advising the defendant on his plea; many judges will give some indication of their views, with reservations, in this way,

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although some will not. This variation would not involve participation by the prosecuting counsel.

Against this background, the Court of Appeal has formulated the principle that, while an offender's remorse, expressed in his plea of guilty, may properly be recognized as a mitigating factor, his insistence on being tried can never justify an aggravation of his sentence beyond the point justified by the facts of the offence. Thus in a recent case the Court stated "it is of course wrong that anything should be added to a sentence by virtue of the fact that an accused person has pleaded not guilty. Credit can be given when a person does plead guilty to the fact that that person is facing up to realities and shows some sign of repentance and that may justify a reduction from what would otherwise have been the sentence."²⁶ The Court will accordingly reduce the sentence where it considers that the trial judge has increased it beyond the range for the particular offence because of the nature of the defence,²⁷ or where it considers that the trial judge has not made a proper allowance for the fact that the accused has pleaded guilty.²⁸ Taken in the abstract, this principle appears to be an example of Irish logic, but it has clear meaning when seen against the background of a pattern of reasonably clearly established norms for sentences of imprisonment; it will be argued later that such norms exist. If the norm for a given offence in a given set of circumstances is in the region of three years' imprisonment, the principle allows some deduction from that figure in favour of the offender who pleads guilty, but prohibits an increase in the sentence beyond that point for the man who pleads not guilty and is convicted by a jury. The same rule prohibits an increase in the sentence beyond the established norm where the accused conducts his

26. *Regina v. McGill* (No. 1688/65, Ct. Crim. App., Dec. 16, 1965).

27. See *Regina v. Behman*, [1967] CRIM. L. REV. (Eng.) 597 (C.A. Crim. Div.), where the Court reduced a sentence from three years' imprisonment to two years', saying that remarks made by the trial judge "can only mean in the present case that the . . . [trial judge] was giving something more than he would otherwise have done because this man had chosen to plead not guilty and accordingly to have told a lot of lies. This is not a case where a judge is saying 'you have shown no remorse, you have continued to plead guilty when you knew you were guilty and accordingly I cannot knock anything of the sentence appropriate'. . . ."

28. See *Regina v. Davies*, [1965] CRIM. L. REV. (Eng.) 251 (Ct. Crim. App.), where a schoolmaster pleaded guilty to indecently assaulting seven young boys at the school where he taught. The court stated that "this is above all a case of where the prisoner has shown a real degree of repentance. . . . He pleaded guilty despite the offer of considerable sums of money from friends to conduct his defence. . . . He recognized that he had to be punished and felt that he wanted the punishment. . . . The fact that he has shown this degree of repentance makes this court come to the conclusion that it would be right to interfere in this case." The sentence was reduced from six years' imprisonment to four (there was no evidence that the appellant was likely to repeat the offence in the future).

case in a particular manner, as by making allegations against the prosecution witnesses or the police,²⁹ or even behaves improperly to the court.³⁰ At the same time, reduction of sentence in favour of the accused who pleads guilty is not automatic; it will normally occur only when there is some evidence of genuine remorse, and will vary in its effect according to the degree of remorse shown.³¹

Consecutive Sentences.—Where an offender is convicted on two or more counts of an indictment, or two or more indictments, English law allows a court to impose sentences on each count to run concurrently or consecutively. Similarly, where an offender is already serving a sentence at the time of his conviction, the court may order the sentence imposed for the subsequent conviction to begin at once and run concurrently with the earlier sentence, or to begin at the expiration of that sentence. No sentence can be antedated. To govern the exercise of this discretion, the Court has established two major principles and several minor ones.

The first principle governing the use of consecutive sentences is that such may be imposed only on offences which are totally separate and distinct. Where the convictions represent in effect alternative charges on the same fact situation,³² or a single transaction involving more than one item of subject matter,³³ or even a series of related and similar offences committed closely together in time,³⁴ concurrent sentences must

29. See *Regina v. Thomas* (No. 741/67, C.A. Crim. Div., April 28, 1967), where the Court said "the fact that an accused man in the course of his defence attacks, however unjustifiably, the evidence given by a police officer or any other witness, ought not to add one day to the sentence which he receives. . . . There are circumstances . . . which may serve to reduce what would otherwise be an appropriate sentence, but the appropriate sentence cannot be increased by any attack that may be made on the credibility of any witness."

30. See *Rex v. Aston*, [1948] W.N. 252 (Ct. Crim. App.), where the defendant addressed abusive remarks to the trial judge directly: the Court said that it was wrong to increase the sentence for this reason. A more recent illustration is *Regina v. Jacka* (No. 2304/66, C.A. Crim. Div., Oct. 6, 1966).

31. The existence of remorse will be judged in part from the attitude of the accused in court and the view of the probation officer expressed in his pre-sentence report, but mostly from the behaviour of the offender before proceedings were begun. Thus the offender who spontaneously admits his offences, or provides evidence without which it would not be possible to convict him, is most likely to obtain some reduction in his sentence.

32. See, e.g., *Regina v. Thompson* (No. 2370/62, Ct. Crim. App., Feb. 19, 1963) where the appellant sold a car which was hired to him by a hire purchase company; this amounted to theft of the car from the finance company and obtaining the price by false pretence; the Court held that consecutive sentences were inappropriate.

33. See, e.g., *Regina v. Douglas* (No. 1095/66, C.A. Crim. Div., July 27, 1966), where it was held inappropriate to impose consecutive sentences in respect of three offences of unlawfully importing hemp, where the offences related to three parcels sent through the post at the same time.

34. See *Regina v. Gilmore* (No. 285/65, C.A. Crim. Div., June 2, 1967), where two men were attacked in succession as part of one preconceived scheme. Contrast *Regina v.*

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be passed. The second major principle is that the aggregate of the sentences imposed must bear some relationship to the gravity of the individual offences. Even for completely separate offences, it is not permissible to aggregate consecutive sentences so that a total is reached which is far in excess of what would be considered appropriate for the most serious of the individual offences. A clear illustration of this principle is provided by a case in which two men were sentenced to three and two consecutive periods respectively of five years' imprisonment for a number of robberies. The Court observed that "though serious offences, they are not of the most serious of this type that has come before the court. . . . At the end of the day . . . one really has to see how the total sentences, however made up, fit into the general pattern of sentences which the court is imposing." As the offences concerned did not involve the high degree of planning, large sums of money, and extreme violence which were characteristic of the offences for which sentences in the region of fifteen years' imprisonment were normally reserved, the total sentences were reduced to ten years' and seven years' imprisonment respectively.³⁵ In another case where the appellant was sentenced to a total period of fourteen years' imprisonment for a series of breaking offences, the Court reduced the total sentence to ten years, stating that it did so "not because there was any error of principle on the part of the learned . . . [trial judge] nor because his sentences were, viewed in isolation, at all erroneous on the side of excess, but solely because in mercy this Court feels that it should, illogically may be but in mercy, lighten the total burden on this man."³⁶ While this principle has not yet been defined with a high degree of precision, it is clearly effective to prevent the massive aggregations of consecutive sentences found in some American jurisdictions.

The minor principles found in this area are of less general interest; they include the policy that where an offender subject to a probation order commits a further offence, the sentence for the original offence should be consecutive to the one imposed for the subsequent offence rather than concurrent,³⁷ and that it is not permissible to increase the

Moylan (No. 1842/65, Ct. Crim. App., Dec. 16, 1965), where consecutive sentences were upheld, the Court being influenced apparently by the fact that the intention to attack the second victim was not formed until the attack on the first victim was complete. Similarly, consecutive sentences are normally upheld for an assault on an officer attempting to arrest the offender, and the offence for which the arrest was being made.

35. Regina v. Baron, [1964] CRIM. L. REV. (Eng.) 609 (Ct. Crim. App.).

36. Regina v. McMahon (No. 2279/63, Ct. Crim. App., Feb. 7, 1963).

37. Regina v. Webb, [1953] 2 Q.B. 390 (Ct. Crim. App.). The sentence for the original

length of one of two consecutive sentences so as to avoid limitations on the maximum sentence permitted by statute for the offence for which the other sentence is imposed.³⁸ However, it is permitted to pass consecutive maximum sentences where they relate to separate and distinct offences, subject to the "overall aggregate" principle.³⁹

The Theoretical Basis of Sentencing Policy

The first step towards the evolution of sentencing policies is the resolution of conflicts created by different theories of punishment, most commonly between general deterrence or retribution on the one hand and rehabilitation on the other. The statutory structure of sentencing in England is such that these aims are seen by the Court as generally irreconcilable, and it follows that in many cases the sentencer must make a preliminary policy decision between a deterrent sentence, usually imprisonment, and a rehabilitative measure such as probation or one of the other individualised measures mentioned earlier.⁴⁰ In the light of this policy decision, the details of the sentence are worked out. If the primary decision favours deterrence, expressed in the form of a sentence of imprisonment, the length of the sentence will be calculated in terms of the offender's responsibility—the gravity of the offence and the existence of mitigating factors—rather than his needs in terms of rehabilitation. Where the primary decision favours individualisation, the details of the sentence will be determined in the light of the offender's needs in terms of training and supervision, rather than the gravity of the offence. The secondary decision in each case involves the application of different concepts and principles.⁴¹ It follows that sentencing policy may be found in three contexts—policy governing the basic choice between deterrence and individualisation; policy governing the detailed application of deterrence in terms of the process of calcu-

offence will normally be imposed at a separate proceeding following the conviction and sentence for the subsequent offence.

38. See *Regina v. Pritchard* (No. 1376/62, Ct. Crim. App., Sept. 26, 1962), where the appellant was sentenced to twelve months' imprisonment for larceny and six months' consecutive for being found on enclosed premises; when it was pointed out that the maximum for being found on enclosed premises was three months, the trial judge increased the sentence on the larceny count to fifteen months. The Court said that this was "wrong in principle" and reduced that sentence again to twelve months.

39. See, e.g., *Regina v. Blake*, [1962] 2 Q.B. 377 (Ct. Crim. App.).

40. In many cases, of course, there will be no appropriate individualised measure and thus no effective scope for a policy choice.

41. For a more detailed analysis, see Thomas, *Sentencing—The Basic Principles* (pts. 1-2), [1967] CRIM. L. REV. (Eng.) 455, 503.

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lating the length of sentence of imprisonment to be imposed; and policy governing the choice between various individualised measures. It is not proposed to attempt a comprehensive description of the policies adopted by the Court in these areas, but to offer some illustrations of the kind of policies that have been developed.

The Primary Decision.—In those decisions of the Court which involve basic policy issues it is possible to identify a number of different strands which together constitute the fundamental structure of the Court's policy. Thus the Court consistently favours deterrence in cases involving such offences as robbery, rape, serious wounding, and offences involving a breach of trust or the element of organization or professionalism; conversely, individualisation tends to prevail in cases involving offences by minors or persons suffering from mental disorder (not necessarily sufficient to affect their legal responsibility).⁴²

Probably the best illustration of the development of fundamental policies by the Court is provided by the cases involving habitual offenders. Legislation providing special measures for dealing with persistent offenders has existed in England since 1908, and although there have been changes in the form of the legislation the underlying principle has been that the persistent offender may be sentenced to a longer period of detention than his most recent offence would merit.⁴³ A striking feature of the sentencing policy of the Court in the last ten years has been its rejection of this approach to the problem in favour of a policy of rehabilitation based on the use of probation coupled with residence in an environment providing the probationer with some degree of support.⁴⁴ The beginnings of this policy can probably be seen in the Court's reaction to the remodelled system of preventive detention introduced by the Criminal Justice Act 1948. Within a few years the Court had developed a system of criteria which substantially restricted the use of the sentence and narrowed the categories of persons eligible to receive it. Thus although the minimum age for the sentence fixed by statute was thirty, the Court would not normally uphold a

42. For some discussion of these issues, see Thomas, *supra* note 6; Thomas, *Theories of Punishment in the Court of Criminal Appeal*, 27 MODERN L. REV. 546 (1964); Hall, Williams, & Thomas, *The Use of Imprisonment and Borstal Training for Young Offenders Under the Criminal Justice Act 1961*, [1965] CRIM. L. REV. (Eng.) 146.

43. For a history of this legislation, see HOME OFFICE, PREVENTION DETENTION: REPORT OF THE ADVISORY COUNCIL ON THE TREATMENT OF OFFENDERS (1963).

44. In terms of the analysis adopted by the present writer in Thomas, *Sentencing—The Basic Principles*, [1967] CRIM. L. REV. (Eng.) 455; this development should strictly be related to the secondary decision on the basis that it involves a movement from one form of individualised measure to another form of individualised measure.

sentence of preventive detention on persons under thirty-five; although the statute did not require the offender to have served sentences of any particular length, the Court would not normally uphold a sentence unless he had previously served a sentence of imprisonment of three years or more; and although the statute was silent on the point the Court would not normally uphold a sentence of preventive detention where the offender had in the recent past been at large for a period of twelve months or more without committing offences. These and other restrictive criteria came to be sharply defined and were applied by the Court with a high degree of consistency.⁴⁵ Their effect was to limit drastically the number of persons satisfying the statutory conditions of eligibility who actually received the sentence, and to establish the principle that preventive detention was to be used only as a last resort. It should be emphasised at this point that preventive detention was not normally considered appropriate for the man whose offences stood in the first rank of seriousness—armed robbery and organised safebreaking for example. This type of offender is generally dealt with on the basis of the gravity of the offence, irrespective of his record, and normally receives a substantial period of imprisonment.

The beginning of a new approach to the problem became evident in the late nineteen fifties. In a small number of cases the Court varied long sentences of preventive detention to probation. In most of the early cases the situation was broadly the same—the appellant would be a man in his forties convicted of a relatively trivial offence of dishonesty or possibly a breaking offence; he would have a record of convictions and sentences going back many years; and in most cases he would already have served a sentence of preventive detention. In making the variation, the Court would state that there was nothing erroneous in the original sentence, but that an exceptional course was being taken on review in an attempt to prevent the appellant's becoming so completely institutionalised that he could never cope with life in society again.⁴⁶ In most of the cases, the appellant had been offered a place in a hostel maintained by a voluntary society, where he would be subject to some degree of informal supervision. Although not all the appellants succeeded on probation⁴⁷ the Court persisted in this policy and began

45. For citations, see Thomas, *Sentencing—The Case for Reasoned Decisions*, [1963] CRIM. L. REV. (Eng.) 243, 248 for a critical discussion of the Court's policy, see Williams, *The Courts and Persistent Offenders*, [1963] CRIM. L. REV. (Eng.) 730.

46. E.g., *Regina v. Bestford*, [1959] CRIM. L. REV. (Eng.) 160 (Ct. Crim. App.); *Regina v. Hockey*, [1958] CRIM. L. REV. (Eng.) 555 (Ct. Crim. App.). For other citations, see Thomas, *supra* note 42, at 564 n.92.

47. E.g., *Regina v. Keeley*, [1960] 1 W.L.R. 749 (Ct. Crim. App.); *Regina v. Baxter*,

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to extend it to men who had not already served a sentence of preventive detention, again stressing that it was concerned to avert institutionalisation. The use of this approach was still regarded as something exceptional to be adopted only where there was a distinct prospect that the appellant would succeed, usually where there was some new factor in his life which suggested that he would at last achieve stability. In the early sixties the Court was still prepared to uphold sentences of preventive detention quite frequently.

From about 1963 on further developments took place. First, the emphasis in the case of men considered as possible candidates for preventive detention or probation shifted gradually until it became accepted that probation was to be considered the normal and preferred approach, and long-term detention reserved for persistent offenders who had failed to respond to probation in the recent past. Secondly, the use of long-term detention was gradually abandoned; in those cases where probation was considered inappropriate the term of detention imposed came to be shorter than the normal minimum of seven years' preventive detention, and would consist of a sentence of imprisonment in the region of three to five years (as opposed to seven to ten years' preventive detention). Third, and perhaps most significant, the Court began to extend the categories of recidivists to whom the new approach was applied. The Court would now single out the offender, perhaps in his twenties or early thirties, who was beginning to show signs of developing into the kind of persistent recidivist who would eventually reach the same stage of institutionalisation and social inadequacy as those men in their forties with whom the new policy had begun. If an offender in this category showed any sign of responding to probation at this stage in his career, the Court would vary his sentence to a probation order, usually stating that the original sentence was in no way erroneous but that the present was "the psychological moment" at which the risk of putting the appellant on probation might properly be taken, in the hope that he would take the chance and establish a new pattern of life.⁴⁸

This position appears to represent the present policy of the Court in relation to the habitual offender whose offences are not in the first rank

[1963] CRIM. L. REV. (Eng.) 583 (Ct. Crim. App.). In *Regina v. Cullen*, [1962] CRIM. L. REV. (Eng.) 449 (Ct. Crim. App.), the Court varied a sentence of preventive detention to probation for the second time, in view of appellant's response on the earlier occasion.

48. Early instances of this approach are *Regina v. Kyle* (Ct. Crim. App., Oct. 15, 1963), and *Regina v. Leyland*, [1964] CRIM. L. REV. (Eng.) 485 (Ct. Crim. App.).

of seriousness. In the case of the older offender, the Court will seize at any faint hope of rehabilitation, even where it is advised that the chances of success are few. In this category of cases the Court will fall back to the former policy of preventive custody only where the offender has clearly failed to respond to rehabilitative programs in the recent past, and the period of custody will be shorter than was formerly the case. In the case of the "intermediate recidivist" the Court is willing to use probation even where the appellant has no claim to leniency on his own merits, if it is convinced that there is some real chance of turning him from a criminal career. In this respect the Court's policy resembles the policy in relation to fully-fledged recidivists at an earlier stage of development, and it may be that the policy in relation to intermediate recidivists will evolve further.

The development of these policies in relation to recidivists illustrates several aspects of the way judicial review of sentences may contribute to the development of state or nationwide sentencing policies. They illustrate first that judicial review can produce liberal policies which are in advance of legislative or public opinion in the same area. It is significant that the Criminal Justice Act 1967 contains a third system of provisions for long-term detention of persistent offenders, provisions which seem destined to remain unused.⁴⁹ Second, it is worth pointing out that a shift of policy such as that described can only occur if the appellate court takes a broad view of its functions and is prepared to vary sentences which are in no way unjustified, erroneous, or indicative of an abuse of discretion by the trial court. In many of the cases in which these policies have been developed, the Court has taken pains to explain that its decision to vary the sentence did not reflect adversely on the trial judge or indicate that his decision was incorrect.⁵⁰ Third, it would be difficult to find in any of the cases any broad statements of penal philosophy or any discussion of the relative importance of the concepts of prevention, deterrence, and rehabilitation. No individual case taken by itself has much general significance or yields much to minute analysis; there are no landmark decisions in this area. Nevertheless, a substantial change of policy has clearly taken place.⁵¹ The

49. See Criminal Justice Act 1967, c. 80, § 37. For a discussion of these provisions, see Thomas, note 9 *supra*.

50. See, e.g., *Regina v. Hunt* (No. 1117/64, Ct. Crim. App., Oct. 2, 1964) (set out in full in MEADOR REPORT 153).

51. The approach in the cases described may be compared to that evidenced in *Rex v. Bachelor*, 36 Cr. App. 64 (1952), where the appellant, a man with thirty previous convictions, appealed against a sentence of eight years' preventive detention. He had

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final point is the extent to which this change of policy has affected sentencing in the trial courts. In the absence of reliable data it is not possible to offer any firm conclusion, but it is a clear impression of the present writer, based in part on the records of men appealing to the Court, that lower courts are following the lead of the Court of Appeal in this context.

The Implementation of Deterrence: The Working of the Tariff Systems.—The use of rehabilitative measures for the inadequate persistent offender does not mean that the Court has rejected the concepts of deterrence and retribution in other contexts. In many areas of sentencing, sentences of imprisonment are upheld in cases where rehabilitation is a real possibility in deference to general deterrence⁵² or less frequently, retribution.⁵³ The process of calculating the length of a sentence of imprisonment is subject to a complex series of rules and practices which resemble in some respects the substantive criminal law, in that there is a "general part" and a "special part." The "general part" might be said to include those rules of general application governing such questions as the weight to be given to the offender's previous criminal record and the recognition of mitigating factors; the "special part" consists of the norms or ranges of sentences available for each category of offence. For convenience, it is proposed to illustrate the "special part" first.

One area which illustrates the development of norms or ranges of sentences is that of unlawful abortion. The substantive law is contained in a statute of 1861⁵⁴ which prescribes any form of unlawful abortion⁵⁵ and provides that a person convicted of any of the offences under the section may be imprisoned for life.⁵⁶ Within this wide area of discretion, the Court has developed a structure of norms which appear to be followed fairly generally by trial courts, and which owes nothing to the legislative framework. While the Court generally follows a policy of

been put on probation not long before by a court of quarter session and the Court commented that this was "difficult to understand in the case of a man with this record."

52. See, e.g., *Regina v. Higo*, [1964] CRIM. L. REV. (Eng.) 485 (Ct. Crim. App.), where a youth of eighteen, with no previous record, was convicted of armed robbery; the Court refused to vary a sentence of four years' imprisonment to probation, saying "this is not a case where the boy's own personal interest weighs heavily in the scale as to what should be done. This is a case where a deterrent sentence is called for in the public interest."

53. See *Regina v. Llewellyn-Jones*, 51 Cr. App. 204 (1967).

54. Offences Against the Person Act, 1861, 24 & 25 Vict., c. 100, § 58.

55. The Abortion Act 1967 now allows pregnancy to be terminated in certain circumstances; the position stated in the text seems unlikely to be affected.

56. The original section provided for penal servitude, a form of sentence now replaced by imprisonment. See Criminal Justice Act, 1948, 11 & 12 Geo. 6, c. 58, § 1.

deterrence in this context, it has fixed an effective maximum sentence of about six or seven years' imprisonment and has established gradations within the scale from the effective maximum to the effective minimum of about one year to eighteen months' imprisonment. The point within this range which a particular sentence is fixed depends almost entirely on the degree of "professionalism" involved—the person performing large numbers of unlawful abortions at a substantial profit and as a major source of income will attract a sentence near the top of the scale; a person performing occasional abortions for small sums—the "semi-professional"—will be placed near the middle of the scale; and a person carrying out an abortion with no financial motive on an isolated occasion will attract a sentence near the bottom of the effective scale. It is not proposed to argue the merits of this policy in social terms—it could be argued that the large-scale abortionist, experienced though without medical qualifications, presents less of a danger than the amateur who is probably more likely to cause the death of the woman involved—but merely to use it as illustration of the fact that a system of appellate review can lead to the development of norms in this area. As the previous section illustrated, appellate review can also be the vehicle by which policy is redirected.

A few cases will illustrate the main gradations in the scale of sentences for abortionists. Typical of the "full-scale professional" is the case⁵⁷ of a man of fifty-eight with no previous convictions who admitted nine charges of procuring miscarriage. There was evidence which showed that the appellant had been (in the words of the Court) "carrying on a wholesale abortionist's business"—in one recent year he had received about 5,600 pounds in fees, and paid out over 1,350 pounds in commission to persons introducing clients to him. Although he had no medical training, all the operations had been carried out in hygienic conditions and there was no evidence of any client's suffering illness as a result of his activity. The Court said that "in a case of this sort . . . the punishment must be of a deterrent nature not to prevent this appellant doing it again but to prevent other people doing operations of this sort and on this scale" and upheld the sentence of six years' imprisonment. A similar approach is seen in the case⁵⁸ of a woman who admitted a total of forty offences of procuring miscarriage; it was

57. *Regina v. Hinton* (No. 1554/61, Ct. Crim. App., Jan. 22, 1962).

58. *Regina v. Stolarska*, [1962] CRIM. L. REV. (Eng.) 411 (Ct. Crim. App.). See also *Regina v. Larroque*, [1963] CRIM. L. REV. (Eng.) 62 (Ct. Crim. App.).

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alleged that she had performed between two and three hundred operations over a period of four years, earning something in the region of 1,000 pounds in all. The Court again stated that "here is a professional abortionist who has to be given such a punishment as will not only punish her but will be sufficient to deter others who do the like" but considered that even allowing for this element, the sentence of seven years' imprisonment was excessive; the sentence was accordingly reduced to five years. The difference between the "full-scale professional" and the "semi-professional" is one of degree—the latter is one who performs the operation for a fee, but less frequently than the former. The Court's consciousness of the difference is shown by a case⁵⁹ of a man of forty-seven, again with no previous convictions, who was convicted of one count of procuring a miscarriage; it was said that he had been paid a fee of ten pounds but there was no evidence of other offences of a similar character. The Court reduced the sentence of seven years' imprisonment to three years' imprisonment. Other cases show the Court upholding sentences in the region of three to four years' imprisonment for other persons in the "semi-professional" category.⁶⁰ Exact comparisons do show some minor discrepancies, as a case⁶¹ similar to that described above illustrates; here a man of forty-five with no previous convictions appealed against his sentence of four years' imprisonment for procuring miscarriage; it was said that he had accepted a fee of twenty-five pounds to abort a young girl. The Court held that there was no evidence that the appellant committed other offences, and reduced this sentence to two years' imprisonment. It could be argued that there is no significant difference between this case and the last one described to justify this difference.⁶² The answer to this is that the dis-

59. *Regina v. Olijnyk* (No. 3654/67, C.A. Crim. Div., Oct. 13, 1967).

60. *See, e.g., Regina v. McPherson* (No. 1337/67, C.A. Crim. Div., May 1, 1967) (woman of forty-seven admitting nine offences over a period of five years for fee of ten to twenty-five pounds; four years' imprisonment upheld); *Regina v. Vallance* (No. 2236/67, C.A. Crim. Div., Oct. 12, 1967) (woman of sixty-one, two previous convictions for procuring miscarriage, convicted of one offence for which she was paid thirty-five pounds; thirty months' imprisonment upheld); *Regina v. Capp* (No. 2912/66, C.A. Crim. Div., Dec. 8, 1966) (woman admitting seven offences over a period of three and half years, for fee of between twenty and thirty pounds; sentence of three years' imprisonment upheld, Court referring to her as a "professional abortionist").

61. *Regina v. Dixon* (No. 509/62, Ct. Crim. App., May 3, 1962).

62. The earlier case was of course not cited to the Court in the course of the later one, as citation of sentence decisions is rare in the extreme. It is possible to see some difference which might have significance in terms of the Court's policy: in *Olijnyk* the Court observed that the appellant had not caused injury to the girl, from which it suggested that some inference of previous experience could be drawn; whereas in *Dixon* the girl concerned nearly died as a result of the appellant's intervention, suggesting that the appellant was inexperienced.

crepancy is relatively small and within the margin of tolerance that must inevitably exist in sentencing. An illustration of the "true amateur" is provided by the case of a woman of thirty, again with no previous convictions and with some experience as a nurse, who was convicted of one count of attempting to procure the miscarriage of a girl of sixteen who subsequently required hospital treatment. There was no evidence that the appellant had received any money or committed further offences, and the Court upheld a sentence of eighteen months' imprisonment, observing that "there was no evidence . . . that she was a professional abortionist making a regular income out of activities of this kind. If that had been the case no doubt the sentence would have been substantially longer."⁶³

Norms similar to these can be found in most areas of criminal behaviour.⁶⁴ Sometimes the greater variety in the circumstances accompanying different kinds of offence make the basic norms more difficult to identify—in the particular examples chosen the task of identifying the norms is simplified by the fact that most of the offenders concerned had no previous convictions and the essential nature of the offence was the same in each case. In terms of the significance of appellate review to the development of norms such as these it is worth pointing out again that no individual case contains a clear statement of the Court's policy, beyond a reference to the presence or absence of the element of professionalism; yet taking the cases together the policy becomes perfectly clear. The second point which these cases illustrate is the acceptance of the established norms by the trial courts; in only three of the ten cases cited did the Court interfere with the trial judges' sentence. While this has no significance in statistical terms it seems clear that some trial judges at least are aware of the basic distinctions made by the Court of Appeal.

Against the pattern of norms established for each main group of offences, a series of general principles operate. The process of fixing the length of a sentence of imprisonment in effect involves using the appropriate norms as a starting point, and then making adjustments from that starting point in terms of the general principles. Again the nature

63. *Regina v. Castagna* (No. 3937/66, C.A. Crim. Div., Feb. 14, 1967). Similar sentences were upheld in *Regina v. Solomon* (No. 2246/65, Ct. Crim. App., Dec. 20, 1967), where two young nurses, each of good character, admitted one charge of procuring the miscarriage of a third. Again there was no suggestion of professionalism or the receipt of a fee.

64. For further illustrations, see Thomas, *Sentencing—The Basic Principles*, [1967] CRIM. L. REV. (Eng.) 503, 514.

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of these principles will be illustrated by reference to a few of them rather than an attempt at a comprehensive description.

Probably the most important general principles are those which relate to the offender's previous criminal record. The fundamental principle in this area is that the offender's record, however bad it may be, does not justify a sentence in excess of the "norm" appropriate to the facts of the particular offence for which he is to be sentenced on the present occasion. Allowance can be made in mitigation for good record, or for moderately good record, but the "norm" established for the offence in the particular circumstances acts as an absolute ceiling on the sentence. The principle is analogous to that governing sentence concessions in cases of pleas of guilty, described above. Many cases can be cited to illustrate this principle,⁶⁵ but one will suffice.⁶⁶ The appellant, a man of twenty-eight, was sentenced to six years' imprisonment for living on the earnings of prostitution. The appellant had two previous convictions for similar offences and had been sentenced on the last occasion to four and a half years' imprisonment, but it was accepted that on this occasion the woman concerned was a prostitute before she met the appellant, that she came to live with him primarily to look after his young son, and had returned to prostitution on her own initiative; there was no question of the appellant's having used violence or in any way having forced her to return to prostitution.⁶⁷ The Court reduced the sentence to three years' imprisonment, saying that the trial judge had had too much regard to the appellant's previous convictions and such an approach "masked the true principle of sentencing in a case of this kind, and that is . . . a man must not be sentenced on his record, he must be sentenced on the facts which have come out in evi-

65. For some earlier citations, see Thomas, note 42 *supra*. The principle did not apply to the special sentence of preventive detention, and the abolition of that sentence has led to some confusion. For the earlier distinction between the principles governing preventive detention and those governing imprisonment, see Williams, note 45 *supra*; for more recent developments, see Thomas, *The Criminal Justice Bill: New Issues in Sentencing Policy*, [1967] CRIM. L. REV. (Eng.) 277.

66. *Regina v. Griffiths* (No. 2313/66, C.A. Crim. Div., Nov. 29, 1966).

67. Other cases involving this offence clearly show that the most significant factor affecting the sentence within the statutory maximum of seven years' imprisonment is the degree of control exercised by the offender. Two extreme cases are *Regina v. Norris*, [1962] CRIM. L. REV. (Eng.) 498 (Ct. Crim. App.), and *Regina v. Broad*, [1963] CRIM. L. REV. (Eng.) 298 (Ct. Crim. App.). In *Norris* the appellant was said to have driven his wife into prostitution; his sentence was increased from three years' imprisonment to five. In *Broad* the appellant had married a woman who was already operating two brothels and in effect took over the business side of the operation, keeping on his normal job and exercising no control over the girls. His sentence was reduced from seven years' to four years' imprisonment.

dence or alternatively have been put before the court after a plea of guilty."

The principle illustrated in this case and found in very many others does not mean that the appellant's record has no significance in the calculation of the length of his sentence (as opposed to the primary decision to sentence him to imprisonment). The operating policy is that good record normally has substantial mitigating effect, and this mitigating effect declines gradually as a criminal record is built up rather than being extinguished by a single conviction. The Court thus distinguishes between offenders according to their records, but subject to the overall ceiling imposed by the relative gravity of the offence for which they are sentenced.⁶⁸

Two subsidiary principles which illustrate the development of relatively complex concepts can be described as the "gap principle" and the "jump effect." The essence of the "gap principle" is that however bad an offender's record may be, the existence of a significant period of good behaviour in the relatively recent past counts as a substantial mitigating factor in his favour if he subsequently commits an offence, and in some cases has greater mitigating effect even than a simple clean record. The Court will normally disregard previous offences entirely when the gap is of a substantial number of years' duration,⁶⁹ and this principle has now been given some statutory force.⁷⁰ When the gap is shorter, it will still have considerable significance. In one case⁷¹ a man of forty-one was sentenced to four years' imprisonment for house breaking. He had had ten previous convictions, one of which resulted in a sentence of seven years' imprisonment. After his release from this sentence he had married and committed no further serious offences in the next four years, at the same time achieving a record of steady employ-

68. A good illustration is provided by *Regina v. Flack* (No. 1911/64, Ct. Crim. App., Dec. 12, 1964), where three men were convicted of participation in what was described as an "organised raid" on a railroad good yard. One man, aged thirty-six, had had ten previous convictions and had served a sentence of seven years' imprisonment; his sentence of six years' imprisonment was upheld. Another, aged thirty-five, had had five previous convictions and his longest previous sentence was nine months' imprisonment; his sentence was reduced from six to three years' imprisonment. The third man, aged thirty, had had one previous conviction for which he had been conditionally discharged; his sentence was reduced from six years' to eighteen months' imprisonment.

69. See, e.g., *Regina v. Smith* (No. 1316/64, Ct. Crim. App., Sept. 25, 1964), where a man of fifty appealed against a sentence of six months' imprisonment for fraudulently abstracting electricity; the Court stated that although he had had a previous conviction for theft sixteen years' earlier, he should be treated as a man of good character. His sentence was reduced so as to allow him to be discharged immediately.

70. See Children and Young Persons Act 1963, c. 37, § 16(2).

71. *Regina v. Rosa* (No. 2069/65, Ct. Crim. App., Dec. 16, 1965).

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ment which the Court considered "distinctly to his credit." Solely in view of the appellant's efforts since his last release, his sentence was reduced to two years' imprisonment. As this case suggests, the rationale of the gap principle is that the offender has made an effort to rehabilitate himself and, where there is evidence of this, the Court will be influenced by it even where the period involved is relatively short. In one case⁷² the period was only a few months. The appellant, a man of twenty-five, had had nine previous convictions for violence and dishonesty and following his release from a sentence of four years' imprisonment he had moved from Scotland to a town in the southwest of England, where he found employment. In this job he came into contact with a man who constantly and deliberately provoked him and eventually the appellant assaulted his provoker, striking him a blow which broke his spectacles and caused severe lacerations to his face. The appellant was sentenced to two years' imprisonment; the Court considered that he should have been given credit for "trying to put behind him his criminal past" and reduced the sentence to twelve months.⁷³

The "jump effect" is rather different and less likely to carry weight than the "gap principle." It appears to be derived from the basic concept that the mitigating effect of good character diminishes gradually, rather than disappearing completely with one conviction. One⁷⁴ of a considerable number of cases illustrating the point involved a man sentenced to seven years' imprisonment for a series of frauds mainly on women. He had had several previous convictions for offences of a similar character but had never received a sentence for longer than nine months' imprisonment. The Court reduced the sentence from seven years' to five years' imprisonment, saying that

if this man had been more severely dealt with in the past, they would not have dreamed of interfering with this sentence . . . but it is to be observed that in regard to his past offences . . . the maximum prison sentence that he has had is one of nine months. In those circumstances . . . this Court feels that the jump from nine months to seven years is really too great.

The other cases in which the "jump effect" is seen in operation indicate that it is limited to cases where the offender's offences are similar

72. *Regina v. Mackey*, [1965] CRIM. L. REV. (Eng.) 122 (Ct. Crim. App. 1964).

73. The "gap principle" clearly has connections with the policy of using probation in the case of the "intermediate recidivist," described earlier: in a later stage of the development of that policy, the case described in the text might have been dealt with in that way.

74. *Regina v. Davis* (No. 1814/64, Ct. Crim. App., Oct. 12, 1964).

in character to the earlier ones; it would not appear to apply to the situation where the offender turns to a new area of crime of a more serious nature.

There are other subsidiaries of the general principle that good character has a mitigating effect which diminishes gradually. These include the general mitigating effect of youth, where a similar effect is observable; age is most significant as a mitigating factor where the offender is in his late teenage,⁷⁵ but does not lose all its significance until the offender is nearly thirty. Another is the significance of remorse, mentioned earlier. The weight that such factors have tends to vary immensely with the gravity of the offence. Some principles are negative in form, thus the Court will rarely reduce a sentence on the sole ground that the appellant's family will suffer or that the appellant is in bad health,⁷⁶ unless it is a causative factor or there is a probability that the offender will not survive his sentence.

Individualisation.—There is less scope for the development of principles in the context of the use of individualised measures than in other areas. Once the primary decision to use an individualised measure has been taken the problem becomes one of finding the most appropriate of the available alternatives to suit the particular offender, and in this process the Court is guided more by the various pre-sentence reports which will be available rather than any firm policies of its own. Most of the principles found in this area relate to the detailed application of the statutory provisions governing individualised measures, and no purpose would be served by illustrating them. One more general issue which can be mentioned is the use of individualised measures which have a more severe impact on the offender's freedom than the alternative punitive sentence. There was considerable doubt as to the permissibility of subjecting the offender, in what are considered to be his best interests, to a custodial training sentence of longer duration than the sentence of imprisonment which would be considered fair in relation to the offence he has committed. After some hesitation, the Court has generally come to the conclusion that a sentence which has this effect is permissible if it can be justified as being in the long-term interests of the offender. The matter has been most litigated in connection with

75. It is rare for an offender under fifteen to come before the Court. In most cases involving offenders under twenty-one, an individualised approach is preferred; the reference in the text is to those exceptional cases where a sentence of imprisonment is considered appropriate.

76. The matter is regarded as one more properly in the sphere of executive clemency. See MEADOR REPORT 133.

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the sentence of Borstal training, a special sentence for offenders aged between fifteen and twenty-one and designed primarily for rehabilitative training. The sentence involves a minimum period of six months in custody (with a maximum of two years) and can be imposed for any offence for which the offender could be sentenced to imprisonment. The question arose whether a sentence of Borstal training could properly be passed where the maximum sentence of imprisonment for the offence was less than six months. After ruling at first that it could not,⁷⁷ the Court reversed itself and said that the sentence could be used in such a case.⁷⁸ The Court subsequently stated that

the fact that a sentence of Borstal training may have the effect of depriving a man of his freedom for a longer period than the maximum sentence of imprisonment which could be imposed for his offence is a relevant consideration for the court before a Borstal sentence is passed but does not deprive the court of power and discretion to impose a Borstal sentence.⁷⁹

A similar position has been taken with relation to the commitment of mentally disordered offenders to hospital; the Court has on several occasions upheld a hospital order carrying the possibility of a longer period of confinement than the maximum sentence of imprisonment provided for the offence.⁸⁰

THE CASE FOR APPELLATE REVIEW OF SENTENCES

The two major arguments in favour of appellate review of sentences are that it allows the correction of excessive or inappropriate sentences in particular cases and leads to the development of policies in general terms. It is some measure of the English Court's success in the latter respect that the worst disparities and excesses of sentence found in some American jurisdictions⁸¹ are rarely encountered in England but where they do occur the Court's existence is clearly a valuable safeguard against individual injustice of this kind.⁸² The argument of this article has been that the English Court has produced a coherent body of gen-

77. See *Regina v. James*, [1960] 2 All E.R. 863 (Ct. Crim. App.).

78. See *Regina v. Amos*, [1961] 1 W.L.R. 308 (Ct. Crim. App.).

79. *Regina v. Appleyard* (No. 1747/62, Ct. Crim. App., Nov. 2, 1962).

80. See, e.g., *Regina v. Hatt*, [1962] CRIM. L. REV. (Eng.) 647 (Ct. Crim. App.).

81. See the cases cited in ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES 22 (Tent. Draft 1967).

82. The Court has occasionally upheld long sentences, see, e.g., *Regina v. Wilson*, [1965] 1 Q.B. 402 (Ct. Crim. App.); *Regina v. Blake*, [1962] 2 Q.B. 377 (Ct. Crim. App.), but only for offences which it considered to be of quite exceptional gravity.

eral principles of sentencing, and various aspects of this "common law" of sentencing have been illustrated. The two factors mainly contributing to this development are the Court's broad attitude to its functions as an appellate tribunal, and the large number of cases with which it has dealt.

It is frequently stated that the English Court will interfere with a sentence only where it is "erroneous in principle" but this description of the Court's practice is so inadequate as to be misleading. There are in effect five situations in which the Court will intervene. The first, and in terms of the evolution of policies the most important, is the case where a sentence of imprisonment, based directly or indirectly on the concepts of deterrence and retribution, is varied to one of the rehabilitative measures such as probation. It is in these cases that the basic framework of sentencing policy, the fundamental philosophical orientation, is developed. Illustrations of this kind of variation in cases involving recidivists were given earlier; a similar series of cases show the Court favouring with a high degree of consistency the use of rehabilitative measures for mentally disordered offenders whose condition falls short of the legal tests of irresponsibility, and thus evolving a basic policy of sentencing in this area which has for practical purposes supplanted the substantive law.⁸³ It is significant that in many of these cases the Court does not consider the original sentence at all erroneous, excessive, or indicative of an abuse of discretion. Thus in one recent case the Court analysed the process by which the trial judge had arrived at the sentence and indicated that each step was correct; but nevertheless varied the sentence to a probation order, saying that "it is desirable to make absolutely plain that the sentence passed by Quarter Sessions was in no way excessive" but that in view of altered circumstances the Court could, "stretching leniency to the utmost," vary the sentence.⁸⁴ The basis of the Court's readiness to intervene in this kind of situation is the two-stage sentencing decision described earlier, and the Court's view that the primary decision is essentially a choice between penal philosophies rather than an attempt to measure the offender's responsibilities. A sentence may be correct in terms of the tariff system, in the sense that it properly reflects the gravity of the offence and such miti-

83. See, e.g., *Regina v. Cox*, [1968] CRIM. L. REV. (Eng.) 119 (C.A. Crim. Div.); for a general discussion, see Thomas, *Sentencing the Mentally Disturbed Offender*, [1965] CRIM. L. REV. (Eng.) 685.

84. *Regina v. Pears* (No. 4704/67, C.A. Crim. Div., Feb. 8, 1967). See also *Regina v. Hunt* (No. 1117/64, Ct. Crim. App., Oct. 2, 1964) (set out in full in MEADOR REPORT 153).

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gating factors as are present, but the Court will feel free to change the basic policy decision and thus vary the sentence. A more restrictive attitude would clearly limit the scope for the development of the fundamental structure of sentencing policy.

A second kind of variation which does not involve an "error of principle" occurs where the Court substitutes one individualised measure for another, most typically probation for Borstal training. In this situation the Court will normally be concerned only with the individual case and will attempt to determine the best disposal in the light of the various reports before it. It will frequently be in a better position to do this than the trial court as the lapse of time between the passing of sentence and the appeal may allow for observation of the offender's initial reaction to the sentence. Recommendations in the light of this reaction may well be influential. Thus the Court has varied sentences of Borstal training to probation where it has received a report that the appellant has already derived all the benefit from the training that he is likely to⁸⁵ and has upheld sentences of Borstal training that it was inclined to vary on hearing that, contrary to expectations, the appellant was adjusting well to the training program and learning from it.⁸⁶

The question of "error in principle" arises only where the Court is concerned with adjustments to the length of sentences of imprisonment. In this context the Court will intervene in three situations. The first is where the sentence is inconsistent with one of the specific principles established in the cases, such as those relating to consecutive sentences. Here the Court will normally intervene to correct the error even if the total aggregate sentence is not affected and the appellant gains no direct benefit from the intervention.⁸⁷ The second is where the trial court has failed to make proper allowance for some mitigating factor. Here again the Court will make even a very small reduction in the sentence to mark the presence of the mitigating factor (in some cases of course the reduction will be substantial).⁸⁸ Where neither of these factors is pres-

85. See, e.g., *Regina v. McKeon* (Ct. Crim. App., April 13, 1964); *Regina v. James* (Ct. Crim. App., Dec. 20, 1963).

86. See *Regina v. Harvey* (No. 467/64, Ct. Crim. App., April 27, 1964).

87. See, e.g., *Regina v. Hussain*, [1962] Crim. L. Rev. (Eng.) 712 (Ct. Crim. App.), where the Court considered that the appellant had properly been sentenced to a total of five years' imprisonment, but that this was incorrectly made up of two consecutive sentences of three and two years' imprisonment respectively. The sentences were varied to five years' imprisonment concurrent on each count.

88. See *Regina v. Claypole* (No. 282/65, Ct. Crim. App., May 24, 1965), where the Court said that although a sentence would not normally be reduced from five years' to four years' imprisonment, such a reduction would be made in the particular case to reflect the domestic strain on the appellant at the time of the offence.

ent and the basis of the appeal is simply that the sentence is excessive or out of proportion to the offence, the Court is less ready to intervene. Very small adjustments will not be made, and the Court will not reduce the sentence unless it is substantially out of scale. "It is not what each of us might have given in the circumstances but whether the sentences are right in principle and can fairly be said to fall into the general pattern of sentences."⁸⁹ Thus the Court recently said that a reduction in sentence from five years' to four years' imprisonment would not normally be made; "it would merely be tinkering with the sentence."⁹⁰ The refusal of the Court to make this kind of adjustment where there is no issue of principle indicates, as was suggested earlier, that the tariff norms include a fair margin of tolerance.

The situations in which the Court will intervene correspond to the areas—procedure, basic policy, tariff norms, tariff principles, and individualisation—where the Court has developed identifiable policies. It seems clear that the extent to which a reviewing tribunal can develop policies, and the kind of policies it can develop, are directly linked to the view it takes of the limits of its right to intervene, for it is only by intervention that it will evolve these policies. A court which will intervene only where there is abuse of discretion by the trial judge automatically limits its potential contribution to the widest generalities, and probably to the context of procedure. A court which goes further and intervenes where a sentence is excessive or disproportionate although within statutory limits may well develop tariff norms and principles, but will not have sufficient scope to deal with the fundamental issues of penal philosophy which are the basic problems of sentencing in a modern system. In order to reach such questions, the reviewing tribunal must be prepared to discard the narrow approach typically taken by appeal courts (and taken by the English Court when reviewing convictions) in favour of a broader view, and in particular to think in terms of varying the nature of sentences as well as reducing their length.

The second condition necessary to the development of sentencing guidelines is an adequate volume of cases. As was mentioned earlier, the English Court has been involved in sentence review for over sixty years and handles at present several thousand cases a year. The vast majority of these are of a routine nature and do not involve a re-thinking of basic issues once the general pattern has been established, and the

89. *Regina v. Mabrouk* (No. 2401/64, Ct. Crim. App., Feb. 1, 1965).

90. *Regina v. Claypole* (No. 282/65, Ct. Crim. App., May 24, 1965).

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opinions of the Court in this kind of case are of little general interest. The cases in which the fundamentals of policy are determined, the marginal cases, are inevitably less common, and the development of policies must wait on them. It seems unrealistic to expect a court starting from scratch to develop a comprehensive penal philosophy within two or three years on the basis of two or three hundred decisions. Similarly, the researcher should not expect every opinion, even where a sentence is varied, to contain an extended discussion of the philosophical basis of the decision, where that philosophical basis is not in issue. The reduction of a sentence of imprisonment, for instance, will perhaps raise the question whether the sentence is out of scale in relation to the offence, but will not necessarily involve the fundamental premises on which the sentence of imprisonment is based, just as an opinion on a detailed point of evidence will rarely include an extended discussion of the philosophical basis of the rules of relevance and hearsay. Sentencing guidelines are most likely to be developed, insofar as the English experience is an indication, by the gradual process of deciding many cases rather than by a series of dramatic landmark decisions.

A major problem is the communication of developing policies and principles. A serious weakness of the English system is the inadequacy of the reporting of sentencing decisions of the Court of Appeal, although there have been some improvements in the last few years.⁹¹ For this reason, the case law of sentencing in England has generated very little literature and many English lawyers would not accept the principal thesis of this article.⁹² There is no formal doctrine of precedent in operation, and cases are rarely cited in argument before the Court; the section on sentence review in the main practitioner's reference book, *Archbold*, is pitifully inadequate. The policies of the Court can be considered almost an oral tradition. It seems clear that adequate reporting of sentencing decisions will greatly assist and accelerate in the development of sentencing policies, although as the volume of business increases a measure of selectivity will probably become essential. Ade-

91. The best sources are the quarterly *Criminal Appeal Reports*, which now contains a section devoted to sentencing cases and reports the opinion in full, and the monthly *Criminal Law Review*, which contains summaries of a slightly larger number of cases. The major law reports tend to report only those cases which involve a point of statutory interpretation, and *The Times* includes a small selection of decisions apparently chosen on the basis of human interest rather than significance in terms of sentencing policy.

92. See MEADOR REPORT 125.

quate reports will also provide the basis for communication of the evolving policies to the trial courts and their adoption at that level.

The three arguments most commonly raised against appellate review of sentences are that it will lead to demoralisation and resentment among trial judges, that the trial judge is in a better position than the appellate court to assess the offender, and that an appellate system would be swamped with cases. The English experience suggests that none of these arguments carries much weight.

There is no evidence that subjection to appellate review causes demoralisation or resentment among trial judges in England. Most trial courts appear to endeavour to sentence within the norms established by the Court, insofar as they have become diffused into the general legal atmosphere. It is difficult to substantiate this claim with specific evidence, but it is worth pointing out that the Court finds it necessary to vary only one sentence in every eighteen which is challenged.⁹³ A more significant indication of the attitude of trial judges is perhaps provided by those cases where a trial judge, faced with an unusual or novel problem, has invited the offender to appeal his sentence in order to get an appellate decision on the matter.⁹⁴ The argument that the trial judge is in a better position to assess the offender than the appellate court is similarly unconvincing. Apart from the fact that, as in the United States, the vast majority of defendants plead guilty, and the face-to-face confrontation of the defendant and the judge is consequently of relatively brief duration, English experience shows that the appellate court is often in a far better position than the trial court in terms of information about the offender. If the trial court has failed to obtain a pre-sentence report, the appellate court can obtain one; in addition, the appellate court can frequently obtain information about the offender's initial response to the original sentence, which may be of particular importance. The fact that a specific sentence has been passed will often affect the attitudes of the offender himself, or his family or friends, who may be prepared to offer him some help they were not willing to give him earlier;⁹⁵ this information can be put before the appellate court.

93. See the figures for 1966 quoted in text accompanying note 15 *supra*.

94. See, e.g., *Regina v. Docherty*, [1962] CRIM. L. REV. (Eng.) 851 (Ct. Crim. App.), where a youth of seventeen pleaded guilty to wounding with intent to murder. He had suddenly attacked his grandmother and then equally suddenly desisted. Medical witnesses could find no evidence of mental disorder, but recommended further observation. There was thus no basis for commitment to a mental hospital. The trial judge passed a sentence of life imprisonment and invited the youth to appeal. For another instance, see *Regina v. Flynn*, [1963] CRIM. L. REV. (Eng.) 647 (Ct. Crim. App.).

95. See, e.g., *Regina v. James*, [1965] CRIM. L. REV. (Eng.) 252 (Ct. Crim. App.), where

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The appellate court is thus able to fill any gaps in the information which the trial court had, and additionally supplement the picture before the trial court with additional information of a kind which the trial court could not possibly have.

English experience also suggests that arguments against appellate review based on the theory that every offender will appeal his sentence are without foundation.⁹⁶ Until 1965 when the English Court effectively⁹⁷ lost its power to increase sentences (which was very rarely exercised), about ten percent of all possible applicants would apply for leave to appeal against sentence. Since then there has been a significant increase in the number of persons seeking leave to appeal against their sentences, but as the figures for 1966 (the latest available) show, the proportion has not yet exceeded twenty percent of the possible total. Even though it seems clear that there has been a further significant increase in the number of applications during 1967, the Court is able to dispose of most of its cases within a period of four or five months at most. A random selection of appeals decided in March 1968 show intervals between conviction and disposal of the appeal of between four months and five months.⁹⁸ Where short sentences are involved and there is a prospect that the appellant will complete the sentence before his appeal is heard, the appeal will often be expedited and the appellant released on bail pending the appeal. Although it seems clear that the power to increase sentences does have some deterrent effect on the potential applicant, it is equally clear that its abolition has not led to such an increase in the number of applicants that the Court cannot properly fulfil its functions.⁹⁹

a sentence of five years' imprisonment for indecent assault on a youth was varied to probation with a condition requiring that the appellant submit to psychiatric treatment; at the time of the trial the appellant had shown no interest in treatment, but his attitude changed after the sentence was passed, possibly as a result of the sentence, and the Court made the variation in the light of that change. In *Regina v. Ainsworth* (No. 2806/64, Ct. Crim. App., March 25, 1965), a sentence of Borstal training was passed on a youth, largely because he had no settled home; after the sentence was passed his older brother offered to provide a home for him, and the Court again varied the sentence to probation.

96. In view of the widespread use of negotiated sentences in the United States, it is difficult to see that the view has much basis in any event.

97. The Court declared in October 1965 that it would no longer exercise the power, which was subsequently abolished by the Criminal Appeal Act 1966, c. 31, § 4(2).

98. This probably represents a slightly longer period than was common before 1965. See MEADOR REPORT 123.

99. For a description of the administrative machinery of the Court, see MEADOR REPORT 115-22. The main deterrent now available to the Court against unjustified appeals is the power to order that some part of the time spent in prison should not count towards the sentence. Formerly a period of six weeks was automatically discounted unless the Court ordered otherwise. This power is now exercised only where the applicant re-

One of the most controversial issues in current discussions of appellate review of sentences in the United States is whether the appellate court should have the power to increase the sentence passed by the trial court.¹⁰⁰ English experience may have some relevance to these arguments, particularly as the power to increase sentence was abolished in October 1966 after nearly sixty years of the existence of appellate review of sentences. Probably the most important conclusion to be drawn from English experience in this area is that the existence or non-existence of the power to increase sentence is an issue of marginal importance at best, which should not be allowed to obscure the more central problems such as that of the appellate court striking the right balance between a too restricted view of its right to intervene on one hand and excessive interference on the other. When the power to increase sentence existed in England it was rarely used, and since it has been abolished it has scarcely been missed. As has been shown, the effect of abolishing the power to increase sentences has been to increase the number of applications for leave to appeal against sentence, but not to such an extent that the Court's work has been seriously retarded. The Court has said on a few occasions since the power was withdrawn that a particular sentence might have been increased, but the main body of the Court's business has not been affected. Where previously the Court might increase a sentence to establish a norm at a higher level than that represented by the sentence it will now simply state that the sentence is excessively lenient.¹⁰¹ Such problems as have arisen as a consequence of the change are attributable to the particular terms of the statute used to abolish the power, the current version of which provides that the sentence substituted by the appeal court should be such that, "taking the case as a whole, the appellant is not more severely dealt with on appeal than he was dealt with by the Court below."¹⁰² Although it was intended that the restriction on the Court should apply only in the

news his application for leave to appeal to the full Court having been refused leave by the single judge and given notice of the possibility that such an order may be made, and in most of the cases where the power is exercised it is clear that the Court considers the original sentence to err on the side of leniency.

100. See the discussion in ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES 54-63 (Tent. Draft 1967), and the amendments recommended by the special committee.

101. See *Regina v. Carter* (No. 3627/67, C.A. Crim. Div., Oct. 12, 1967), described at note 18 *supra*.

102. Criminal Justice Act 1967, c. 80, § 97(7). The original statute prohibiting increase in sentences provided that the Court should not "pass a sentence such that the sentence passed on the part of the indictment on which the appellant remains convicted is of greater severity than the sentence passed at the trial taken as a whole." Criminal Appeal Act 1966, c. 31, § 4(2).

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context of variations in the length of sentences of imprisonment, the statute appears apt to prohibit all variations in sentence which involve the possibility of a longer period of confinement than the original sentence, even though there is also a possibility that the offender will be released earlier under the proposed sentence. Thus the Court has held that it has no power to vary a sentence of ten years' imprisonment to life imprisonment, even though it generally considers the latter sentence more favourable to the appellant than a long fixed-term sentence because of the power of the Secretary of State to release him at any time.¹⁰³ A few definitional problems have arisen (such as whether Borstal training, under which a youth can be detained for a period between six months and two years, is more severe than a sentence of eighteen months, under which the period served would normally be twelve months¹⁰⁴) and more can be envisaged when the newly introduced system of suspended sentences becomes effective. Such problems as these could easily be avoided by a more sophisticated statutory formula. The conclusions which these facts suggest are that although a case can be argued for giving the appellate court power to increase sentences, it can function perfectly well in terms of the development of policies without such a power, and that although the existence of the power does have the effect of deterring some potential applicants, removal of the power does not lead to an unmanageable increase in the number of potential appellants who will seek review of their sentence.

CONCLUSION

The principal argument of this article has been that a court exercising appellate jurisdiction over sentences can develop a meaningful case law of sentencing, provided that it is prepared to take a sufficiently broad view of its functions and discard the normal approach of an appellate court in seeking only errors or abuses. Review should not be limited to reduction of excessive sentences; it is in the substitution of one form of sentence for another that the fundamental policy issues will be resolved.¹⁰⁵ It was also argued that English experience suggests that

103. *Regina v. Gills*, [1967] CRIM. L. REV. (Eng.) 247 (C.A. Crim. Div.).

104. *See, e.g., Regina v. Roderick*, [1967] CRIM. L. REV. (Eng.) 118 (C.A. Crim. Div.).

105. The standards formulated by the American Bar Association go part of the way to meet this requirement, in allowing substitution of one disposition for another, see ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES § 3.3(ii) (Tent. Draft 1967), but fail to make specific provision for variation of the sentence of imprisonment which is not excessive for the

none of the reasons commonly urged against appellate review of sentences has much force, and that the appellate court can function equally well with or without the power to increase sentences, provided that it has an adequate filter system and an efficient administrative office.

offence but nevertheless inappropriate for the offender, *see id.* at § 3.2(i). The commentator takes the view that this kind of variation would come within the scope of the article. *See id.* at 51.

Senator HRUSKA. You may proceed in your own way to make such statement as you wish.

Mr. MEADOR. Thank you, sir.

It is a privilege to be here to join in this discussion on sentence review. I might add by way of additional background on myself in recent times that I have been serving as Chairman of the Courts Task Force of the National Advisory Commission on Criminal Justice, Standards and Goals, and I am currently serving as Director of the Appellate Justice Project of the National Center for State Courts.

My interest in the subject of sentence review stems primarily from experiences I had in England in 1965 and 1966, when I served as a consultant to the American Bar Association in its project on criminal justice standards. I was engaged then to do a field study, so to speak, of the operation of appellate review of sentences in England. I became impressed with the notion in that experience, and my observations and studies since have reenforced in my mind that some mechanism for the review of sentences is an extremely important feature of the criminal justice system which should be adopted in all jurisdictions in this country.

I think there is today a growing acceptance of that concept. There are differences of view about how it should be implemented.

There has been a good deal of discussion about the value of review to eliminate disparities among sentences, that is undesirable disparities, and a way of dealing with excessiveness. I will not discuss that unless there are questions.

I would prefer to direct my remarks to another aspect, another value I see in having a mechanism for sentence review, and that is that it affords a means of developing sentencing principles, a means of developing meaningful guidelines for trial judges, and of introducing a greater rationality into the sentencing process.

Mr. BLAKEY. Professor, could I ask you a question at that point.

Are you familiar with proposed rule 35?

Mr. MEADOR. Yes, in general.

Mr. BLAKEY. Do you think it would be possible to develop a jurisprudence of sentencing following the technique of rule 35?

Mr. MEADOR. I am very doubtful there would be. That is one basic difficulty I have with the device that the proposed rule 35 amendment would set up.

I might interject here that I am reluctant to criticize rule 35 because I have the greatest respect for the work of the Judicial Conference and its committees and particularly for Judge Lumbard.

However, I would have to say that I think rule 35, that kind of district judge panel review device, would not provide a mechanism for developing a body of sentencing principles. It would be a too temporary, shifting kind of forum. It is not contemplated that it would, as a matter of routine, write opinions in sentencing cases. It simply would not give us the kind of device which a stable appellate court would provide. I think that is one of its shortcomings.

The English experience is impressive testimony to how a body of principles can be developed. Attached to my prepared memorandum is a copy of a law review article by Mr. Thomas, who is with the In-

stitute of Criminology at Cambridge University in England. It contains a number of illustrations and makes an impressive showing of how principles can be developed over a period of time in the common law fashion, case by case, by an appellate court. He has also written a book which again I think is persuasive evidence. I have a copy here. This is based on some 6 or 7 years of decisions in the English court of appeal.

I think there is no doubt that the appellate court in the common law sense can develop principles.

Mr. BLAKEY. Did the English court have the power to raise as well as lower sentences?

Mr. MEADOR. It did until 1966, when it was abolished by act of Parliament.

There is appeal only by defendant. The prosecution cannot take an appeal.

Mr. BLAKEY. In the development of a jurisprudence of sentencing do you think it would be important to have the power on the part of the prosecutor to appeal and the power of the court to raise as well?

Mr. MEADOR. Yes, in my judgment the two need to go together. I am persuaded there is value in allowing a prosecution appeal in order to deal with the problem of perhaps undue leniency or discrepancy, or the prosecutor might be one to take an appeal in the case of excessive sentence, in the interest of justice.

I think only if the prosecutor appeals, however, should an increase be permitted.

I am persuaded, as was Parliament in 1966, that allowing an increase on defendant's appeal is undesirable. But I think provisions can be written in allowing prosecution appeal.

With reference to S. 716, if I might say something specifically about that, I find as a whole that to be a good proposal; however, because I do believe in the great value of appellate review as a mechanism for developing a body of principles I would suggest for the subcommittee's consideration the addition of some language that would allow that to be done in a better way.

In the proposed section 3742 in subsection(b), as I read it, the scope of review would be limited to the question of excessiveness.

The bill states: "sentence imposed to determine whether it is excessive."

I would suggest consideration of adding there some language such as: "... whether it is excessive or erroneous in principle," or perhaps even more elaborately put, "excessive, inappropriate, or erroneous in principle."

"Erroneous in principle" language is the English language. That is, the language used in the English system to describe the scope of review of sentences. It connotes the English court is to look at the sentence to determine whether the sentence in the case, in light of all the circumstances, is in accord with sound, enlightened sentencing principles.

There are occasions in which sentences are modified that are not excessive because they are wrong in principle, and the Thomas article which I have attached to my written statement develops that point as does his book.

I do believe that to be such an important feature of the scheme and such an important value of it that the scope of review allowed the appellate court should not be defined by statute so as to be limited merely to the question of excessiveness.

If I might also comment on another aspect of S. 716, in relation to the proposed amendment to rule 35, there is a salutary benefit, it seems to me, in having the sentence review in the same court where the conviction review takes place.

The ABA standards on the appellate review of sentencing take that position. The Courts Task Force and the National Advisory Commission have both taken that position in endorsing the concept of appellate review.

One of the values of having the two together, that is the sentence review and the conviction review, is that this takes pressure, a distorting pressure, off of the conviction. There are situations in which an appellate court sees a miscarriage of justice in the sentence, but limited to reviewing the conviction, it is pressed through its sense of the equities of the situation to distort the law and find some error in the conviction which really isn't a significant error. But it finds the error there in order to be able to get at the sentence indirectly by reversing the conviction. If it had the power to review sentences also, then it could deal with this problem in a straightforward way.

I think many appeals from convictions are motivated by dissatisfaction with the sentence. If the sentence could go up on appeal, then I think the court could deal with the case in a more sound manner.

Rule 35 would not allow that. It would channel into another avenue the sentence issue from the conviction.

Senator HRUSKA. If the witness will yield, the eighth circuit decided a case just recently where the maximum sentence for draft evasion was visited, I believe, upon a member of Jehovah's Witnesses, and he volunteered to accept substitutive service that would be ordered by the court, but not those that would be allotted by the Army. There were many circumstances of that kind.

There was the very plain record of the trial judge in which he invariably put the maximum sentence in every one of the draft evasion cases that came before him, not going by the guidelines for sentencing which the Supreme Court had from time to time expounded upon, and the circuit court there sent the case back.

First of all, they condemned that pattern sentencing.

And they also commented on the severity of the sentence in view of the personality of the man, his record, his very fine character, and so on.

However, that is about as far as they could go.

They expressed the pious hope that the district judge would read the wisdom of the circuit court's opinion and then perhaps moderate his stand a bit.

Inasmuch as not much time has elapsed, we don't know what the district judge will do, but I presume he can ignore it and send it back without change.

It is unfortunate and it is to that type of case that a statute on the subject would be very helpful, separate and apart from a rule.

Let the record include at this time, Mr. Blakey, a copy of that opinion, because it very much sums up in a concrete fashion one of the distressing situations that we do occasionally encounter in this.

I believe the opinion referred to a similar treatment by the sixth circuit in which a similar result was obtained. I don't know if we have that opinion available or whether or not you cite it in your memorandum.

Mr. Meador *U.S. v. McKinney*,¹ and *U.S. v. Daniels*,² both of which are discussed in some remarks of February 1, 1973, in the Congressional Record—

Senator HRUSKA. They have been incorporated in the record of this hearing. [See pp. 5667.]

Mr. MEADOR. They are quite pertinent, I think.

Senator HRUSKA. There was another case in the eighth circuit last year where there were five counts of mail fraud and the same district judge gave the maximum sentence for each one of those five counts.

This was the case of *United States v. Anderson*, 478 F. 2d 443, and the sentence amounted to 25 years, and the judge provided that those years run consecutively.

The conference of the circuit court was really torn asunder with that severity. Bound as they were by what they conceived to be the present state of the law they did dismiss three of the counts, and imposed a 5-year sentence for the other two counts.

I don't recall whether they were to run consecutively or concurrently.

That was the only way at getting at the severity of the sentences which they felt was unwarranted.

Mr. MEADOR. If I may make another observation about S. 716, I think it is important to sentence review that the sentencing judge state the reasons for his sentence. In fact, I think often sentence review would be meaningless without that.

There are many cases in the English system in which it can be seen that the only way the appellate court was able to review the sentence was in light of the reasons given by the trial judge as to why he imposed the sentence.

If one of the purposes of appellate review is to inject a greater rationality into the process, then I think that is an additional argument for requiring a written statement of reasons.

Requiring a judge to state his reasons is very salutary, in any circumstance. It requires him to focus thought and to be sure he is acting in accordance with some principle.

In light of that, I would suggest for the subcommittee's consideration that there be a sentence added at some point in the proposed section 3742, which would simply say this:

The trial judge imposing sentence shall state in writing the reasons for the sentence.

I think this is too important to be left to the happenstance or the good intentions of judges case by case. My view is that there should

¹ *United States v. McKinney*, 6th Cir. No. 72-1480 (decided June 15, 1972).

² *United States v. Daniels*, 446 F.2d 967 (6th Cir. 1971).

be a clear requirement of that in order to make the review genuinely meaningful.

Another observation I have on S. 716 concerns the language in subsection (d) concerning the procedure there.

As subsection (d) is now written, it states that :

The procedure for taking an appeal under this section shall follow the rules of procedure for an appeal to a court of appeals.

I would suggest that the subcommittee consider altering that language to say something like this: "The procedure for taking an appeal under this section shall be in accordance with rules of procedure prescribed by the court of appeals."

My reasons for that suggestion are these: There is increasingly in this country a movement toward a greater flexibility in the appellate process, an idea that the process does not have to be the same for all types of cases. This is a departure from the uniformity notion about rules of procedure which has held sway for the last 30 or 40 years. The reality is that not every case deserves the same process or treatment. More and more courts are recognizing this. I think it is a trend. I would regret to see a statutory provision that locked sentence review into the general rules of appellate procedure.

A good example of this now can be seen in New Jersey, in the Appellate Division of the Superior Court of New Jersey, which is the intermediate State appellate court, which has jurisdiction to review sentences. There they recently adopted a new rule especially tailored to sentence review. Under that rule the normal appellate process does not need to be followed. The defense lawyer merely writes a letter to the appellate court, giving the reasons why he thinks the sentence should be modified. The prosecuting attorney can answer in the same form, by an informal letter. The trial court sends forward to the appellate court all the documents which are relevant, such as the pre-sentence report. Then the appellate court acts on it. It doesn't have to go through the additional lock-step process of a transcript followed by a brief by the defense and the prosecution, et cetera.

This greatly accelerates review. Many of these are simple matters and can move forward expeditiously.

Therefore, I would urge that the statute not include a general rule locking this to the regular appellate process.

Senator HRUSKA. If the gentleman would yield, your description of the situation would appear to possess a lot of merit.

After all, it will be the circuit court that will be passing upon the sentence. They will know what they want for that particular purpose and can probably get at the issue with a lot less effort than if it were locked into the general appellate procedures.

Thank you for making that suggestion.

Mr. MEADOR. Each court of appeals could have the freedom to tailor the process as it thought best and experience would evolve and show how it could best be handled.

If I might make one concluding comment concerning proposed rule 35, there is a feature of that rule that I find probably undesirable in the interest of an ordered system of administration of justice under law. It is the appearance of this feature perhaps more than

the reality. It is provided that the reviewing panel of district judges would be selected and constituted by the chief judge, and that he might shift and reconstitute the panel at his pleasure at any time. The panel in effect would serve at his pleasure.

I find it disturbing to have a court constituted in that fashion from time to time by the decision of any one person. It seems to me it is better in the interest of justice to have a permanently constituted forum that does not shift in quite that way by the decision of the chief judge. I think the appearance of an even-handed administration of justice under law is enhanced by having a more permanent type of court rather than one shifting from time to time by direction of a single official, even though he be a judge.

Mr. Chairman, that concludes the remarks I had in mind to make. I will be happy to answer any other questions.

Mr. BLAKEY. Professor, I have one.

The objection is often raised that appellate review of sentencing would unduly tax the appellate courts.

I wonder if this issue could be met by providing both for pleas of guilty and for sentence?

We now have plea bargaining and we both know the sentence is a crucial issue discussed.

Would it not be available to provide for appellate review only where there is no plea for sentence? Would you comment on that suggestion?

Mr. MEADOR. Yes, I think undoubtedly, as a practical matter, even if nothing is put into any rule or statute about it, where the negotiated plea includes an agreement about sentence and the negotiated agreement is included in the record in the district court, in that circumstance it seems to me as a practical matter the appellate court is not going to touch the sentence. The defendant will have knowingly agreed to it.

I think that in itself, in the nature of things, will cut down on some sentence review.

I do have some question about trying to write into a statute or a rule a provision that might compel this or might somehow try to take care of it.

If a defendant, for example, were required by law to agree to or plead to a sentence if he is going to enter a plea of guilty, it may be that pleas of guilty would be greatly reduced and that would be counterproductive.

On the whole, while I have not thought exhaustively about it, my general view at the moment is that an attempt to formalize in the law any requirement or any provision dealing with that might raise more problems or questions than it would be worth.

My view is to a large extent that it will take care of itself. If a prosecuting attorney can get a negotiated agreement not only to plead guilty but also to a sentence, then I think that will shut off appellate review.

Apart from that, I am doubtful that anything should be in the law.

Senator HRUSKA. Professor, do you find the question of constitutionality of increasing sentences on appeal to be basically settled?

Mr. MEADOR. The increase at the appeal only of the defendant I do not view as altogether settled.

I think that is doubtful and debatable. I am satisfied in my own mind that an appeal by a prosecutor with an ensuing increase should be and would be upheld as constitutional.

I think it is more doubtful where the defendant alone appeals.

Mr. BLAKEY. Do you agree with *Robinson v. Warden*?¹

Mr. MEADOR. Yes. I have no difficulty with that case.

Mr. BLAKEY. That was an appeal by the defendant and an increase was imposed and it was sustained as constitutional.

Mr. MEADOR. Yes.

Mr. BLAKEY. Do you think there is some doubt as to the validity of that opinion?

Mr. MEADOR. No. I don't have any difficulty with that opinion. I think it is in a somewhat different context than a straight appellate increase when the defendant himself appeals. I may be wrong in speculating. It is only my general reaction to the climate of things. I don't say it is unconstitutional. I say it is doubtful. I don't view it as firmly settled. It may very well be upheld.

Senator HRUSKA. If the decision is made upon a two-way review, would it be advisable to separate for drafting purposes the provisions for reduction from the provisions for increase of the sentence so that we could cover it with the separability clause as to the whole bill and if one of them is held invalid, the other would still be in effect, just as sort of a safety device?

Mr. MEADOR. It certainly makes sense to me. I can see no argument against doing that, whether by separate subsections or a wholly separate section.

Senator HRUSKA. Well, I have no further questions.

Mr. Blakey.

Mr. BLAKEY. No.

Mr. LAZARUS. No.

Senator HRUSKA. Thank you for coming.

There were several exhibits attached to your memorandum, Professor Meador. They will be included in the record.

Our next witness will be Dr. Alan Guttmacher and Mrs. Harriet Pilpel, who will concern themselves with S. 1 and S. 1400 on the provisions relating to abortion. Your prepared statements will be included in the record and you may proceed to highlight your statement or comment as you wish.

[The statement follows:]

STATEMENT OF ALAN F. GUTTMACHER, M.D., PRESIDENT, PLANNED
PARENTHOOD FEDERATION OF AMERICA, INC.

My attitude toward abortion comes neither from textbooks nor Sunday School teachings; it results from almost five decades as an obstetrician-gynecologist. In 1923 when graduating from the Johns Hopkins Medical School, I did not question the wisdom of the restrictive abortion statute of the State of Maryland. But shortly after I began residency training and dealt with human beings and their medical problems, my attitude changed. In short sequence, I witnessed the death of three women from illegal abortion, one a fifteen-year old child and another the mother of four. Throughout a long medical career,

¹ *Robinson v. Warden*, 455 F.2d 1172 (4th Cir. 1972).

much as chief of an obstetric-gynecologic service, I saw the senseless carnage of abortion, many self-induced. On my ward at the Mt. Sinai Hospital in New York City, within the same week, two Puerto Rican mothers of several children, fourteen to sixteen weeks pregnant, died from bungled abortions. In this long experience, I never witnessed an abortion fatality among private patients, although I know they infrequently occur.

In my younger, more formative years, I had an experience which particularly jolted my complacency about abortion. A social worker brought a twelve-year old black child to the clinic at The Johns Hopkins Hospital for abortion. She had been impregnated eight weeks before by her father who had been indicted and was imprisoned waiting trial. I was denied permission to abort her by the Chief of Service since the child's life was not endangered by continuation of pregnancy, and seven months later she was delivered of her father's bastard. At the same time, on the private service of a neighboring hospital, I was shown a white child, the daughter of a Colonel from Washington, who had been aborted following impregnation by the building superintendent.

Previous to liberalization, legal and illegal abortion were both drastically discriminatory. Hall¹ in his study of 38½ years of legal abortion at Columbia-Presbyterian Hospital (1932-1970) in New York City shows that the legal abortion-to birth ratio was 6½ higher on the private than on the ward service. Gold² published the abortion incidence for all New York hospitals, 1960-1962. In proprietary institutions it was 3.9 per 1000 live births, in voluntary hospitals 2.4 on the private services and 0.7 on the ward services. Municipal hospitals showed a rate of 0.1 per 1000 live births. There was also a marked ethnic differential: the ratio of therapeutic abortions per 1000 live births was 2.6 for whites, 0.5 for blacks and 0.1 for Puerto Ricans. In addition, abortion policies and rules established by equally good hospitals in New York were confusingly different. Mt. Sinai, for example, permitted abortion for women who contracted German measles in early pregnancy whereas Columbia-Presbyterian did not. Mt. Sinai did not permit abortion for rape, while St. Johns in Brooklyn did.

Illegal abortion was also highly discriminatory. In my Baltimore days, if one had the fee and the sophistication, two excellent full-time physician-abortionists were available. Their names were equally well known to the girl behind the glove counter and the policeman. One of them spoke in defense of the illegal physician-abortionist at a public meeting in Washington claiming there had been only four deaths in the 7,000 abortions with which he had been associated. In New York, a respected senior physician on the visiting staff of Mt. Sinai was discovered by the police to be doing abortions on the side. Then too, affluent patients could always be referred to ethical physicians in Japan for legal abortion. The non-affluent woman had no such opportunities. She could use the services of an ill-prepared paraprofessional such as the notorious midwife, Minnie McAvoy, or the aid of a neighbor, or abort herself.

These observations led me to be seriously dissatisfied with abortion statutes before 1967, abortion permitted only to preserve a pregnant woman's life. I was puzzled what to substitute, partial liberalization or removal of abortion from the criminal code. In 1959, I was present when Professor Herbert Wechsler of Columbia Law School unveiled his model statute³ before the American Law Institute, now termed the A.L.I. statute—abortion permitted to preserve physical or mental health, to eliminate a gravely physically or mentally defective fetus, or to terminate pregnancy resulting from rape or incest. When Wechsler finished, Judge Learned Hand interposed, "It is a rotten law; it's too damned conservative." How right he was, although most disagree with him and hailed the A.L.I. statute.

Even though the A.L.I. Code was not adopted by any state until 1967, its mere promulgation opened the medical profession's eyes to the preservation of health as being a justification for abortion. The most difficult health hazard to document (but equally difficult to refute) was significant trauma to psychic stability by continuation of pregnancy. "Psychiatric" indications for abortions increased rapidly in importance. Tietze's figures demonstrate that in 1963 such

¹ Hall, Robert E., "Induced Abortion in New York City." *American Journal of Obstetrics and Gynecology*, 110:601, 1971.

² Gold, Erhardt, Jacobziner and Nelson, "Therapeutic Abortion in New York City." *American Journal of Public Health*, 55:964, 1965.

³ Model Penal Code 230.3(2), Proposed Official Draft, 1962.

indications accounted for 0.57 legal abortions per 1000 live births; in 1965 the rate was 0.76 and in 1967, 1.50.⁴ The increasing frequency of using psychiatric indications for abortion concerned many. The fact that they were so ill-defined and pliable caused fear that they might become an upperclass ticket for legal abortion, thus increasing discrimination and doing little to reduce abortion morbidity and mortality in the population at large. In 1967, Colorado, California, and North Carolina, and in 1968, Maryland and Georgia modified their respective statutes using the A.L.I. bill as the prototype. Between 1967 and 1968 the incidence of legal abortion for all causes increased from 2.59 to 5.19 per 1000 live births, the rate on psychiatric grounds from 1.50 to 3.61.

From studying the early results of the five states which first liberalized their laws, I concluded abortion should be removed from the criminal code. The number of legal abortions undertaken under the new liberalized laws, when contrasted with the estimated figures of illegal abortions, were far too low. In 1968, for example, California reported only 5,018 abortions under the new law and the estimated illegal abortions at more than 90,000. It is true that the number of legal abortions steadily increased to 116,749 in 1971 but the increase was virtually solely on psychiatric grounds. In California 95 percent of abortions before the Supreme Court decision were performed for that reason.⁵ It placed the psychiatrist in the anomalous position of being an authority in socio-economics. In 1970 I examined the situation personally in Colorado and discovered that two Denver hospitals were doing virtually all the pregnancy interruptions, and these were being performed primarily on private patients. This clearly implied that the state-imposed requirement of two psychiatric consultations was discriminatory against ward patients. Private consultations were so expensive as to be available only to the wealthier and appointments in public psychiatric facilities were booked solid for three months, far beyond the legal time limit to obtain abortion. From these experiences, I concluded that abortion should be treated like other medical procedures—removal from the penal code making it a decision between doctor and patient. This is the only true way to democratize abortion and to bring it into the realm of other therapeutic procedures.

Liberal abortion, by which I mean safe, modern abortion delivered at low cost under the sanction of non-restrictive laws, had its trial in New York, the state in which I reside. This gave the opportunity to observe firsthand how effectively it functions. The three criteria I use for evaluation are straightforward. Does liberal abortion save lives? Does it minimize socio-ethnic discrimination, and does it reduce the incidence of illegal abortion?

Let me first consider maternal mortality. During the two years preceding liberalization of abortion, there were 45 deaths in New York City from criminal abortion. In the two years since implementation of the liberal statute illegal abortion deaths have dropped to 13, seven in the first three months of the new law (July-September 1970) and six in the last 21 months (October 1970-June 1972). It is likely that illegal abortion with its attendant risks will not disappear since some women will always crave the anonymity of a clandestine setting, but there is every evidence illegal abortion will be greatly curtailed. California with partial liberalization of abortion has also noted a decline in illegal abortion deaths from 27 in 1967 to 5 in 1971.⁶

Furthermore, the rate of maternal deaths unassociated with abortion in New York City residents has declined from 34.2 per 100,000 live births before the new abortion law to 26.8 per 100,000 after the new law—an unprecedented decline of 7.4 points. This may be due to a smaller number of high risk mothers delivering, resorting to legal abortion instead: mothers 17 years of age and less, 35 years of age and over, and women from the least privileged socio-economic group. Then too, very premature deliveries, babies one or two pounds, which are attended by a high maternal and fetal mortality, in the past two years, have been halved in incidence at King's County and Harlem Hospitals, large municipal hospitals in New York City. This leads to the suspicion that the 100 percent higher prematurity rate normally seen among the most seriously disadvantaged compared to the affluent may be due in part to artificial pregnancy termination by the former to eliminate rejected pregnancies before fetal viability is reached.

⁴Tietze, C., "Therapeutic Abortions, 1963 to 1968," *Studies in Family Planning*, 5, 1970.

⁵Bureau of Maternal & Child Health, 4th Annual Report on the Implementation of the California Therapeutic Abortion Act, 1971.

⁶State of California Department of Public Health, Bureau of Maternal Child Health.

Accurate figures are available showing the risk of death accruing from legal abortion. There have been 21 deaths in 402,000 legal abortions performed in New York City, a rate of 5.2 per 100,000 operations. Seven of the 21 deaths were in first-trimester cases (2.2 per 100,000) and 14 in late cases (17.5 per 100,000). No death has occurred in more than 100,000 consecutive abortions done by suction (vacuum aspiration) during the last half year or more.⁷ On the basis of the current non-abortion maternal mortality of 26.8 per 100,000, if these 400,000 women had delivered instead of being aborted, it is likely 108 instead of 21 would have died. Thus by reducing illegal abortion deaths by 32 and deaths in childbirth by 87, 119 valuable lives have been saved over a two-year period. Tietze in a thorough study of 72,988 legal abortions (July 1, 1970 to June 30, 1971) performed in 66 institutions all over the country (about one-seventh of all legal abortions in the United States during that period) reports six deaths, a rate of 8.2 per 100,000. All but one death involved abortions in the second trimester; three of the six could be directly attributed to abortion and three from associated conditions.⁸ Hawaii reports one death in 11,800 legal abortions over a two-year period, 8.4 per 100,000.⁹ California reports 11 deaths in 202,475 (1968-1971) abortions, 5.4 per 100,000 abortions. (See footnote 6.)

On the basis of the above data, we may conclude that liberal abortion has diminished deaths from illegal abortion as well as maternal mortality from other causes. Furthermore, abortion in the first trimester carries less than one-tenth the risk of death than does childbirth, and abortions in the second trimester, 65 percent the risk.

What has liberal abortion done to ethnic and socio-economic discrimination in abortion previously noted in New York City? In the second year of the new law, 42 percent of the New York City residents who were aborted were white, 47 percent non-white and 11 percent Puerto Rican. These figures have added meaning when it is pointed out that in the same year whites gave birth to 54 percent of the babies born to New York City residents, non-whites 30 percent and Puerto Ricans 16 percent. Abortion is readily available to all citizens of New York due to the immense cooperation of municipal and voluntary hospitals and the low fees charged by free-standing clinics. In 1971, Medicaid paid for 47 percent of the abortions performed in municipal hospitals.¹⁰ Our experience in New York City strongly indicates that legal abortion is no longer discriminatory; indeed, it appears to have helped to rectify some of the historical imbalance between the access of the different groups to fertility control services.

The third criterion in evaluating the New York City program is what liberal abortion has done to illegal abortion. Dr. Christopher Tietze on the basis of demographic data on New York City births concludes that 70 percent of the abortions performed on city residents would have been performed illegally if the statute had not been liberalized. He estimates that over the two years, 100,000 illegal abortions of New York residents have been averted.¹¹ 51.3 percent of the women aborted in Hawaii stated that if abortion were not legal, they would have sought illegal termination.

An index of the frequency of illegal abortion in a community is the number of incomplete abortions hospitalized and in particular those in which the aborting patient shows fever (septic abortions). Incomplete abortion may result from natural causes, nature not completing the job which began spontaneously, but more often it results from an abortion being initiated by artificial means outside the hospital and the woman being admitted to the hospital to complete the process already initiated. Dr. Schuyler Kohl, a senior Professor at King's County Hospital, stated at a recent meeting that the number of incomplete abortions handled by his hospital decreased from 3,000 a year before the new law to 600 since its passage. Kohl also stated that King's County in the past always had septic abortions on the wards to demonstrate to medical

⁷ Tietze, Pakter and Berger, *Mortality Associated with Legal Abortion in New York City*. In manuscript.

⁸ Tietze & Lewit, "Joint Program for the Study of Abortion." *Studies in Family Planning*. The Population Council, Vol. 3, No. 6, 1972.

⁹ Diamond, Palmore, Smith & Steinhoff, "Abortion in Hawaii." *Perspectives*, 5:54, 1973.

¹⁰ Chase, Gordon, *New York City Abortion Report: The First Two Years*. Mimeographed.

¹¹ Tietze, C., "Two Years Experience with a Liberal Abortion Law: Its Impact on Fertility Trends in New York City." *Family Planning Perspectives*, 5:36, 1973.

students, but now they may go weeks without admitting a septic abortion. The San Francisco General Hospital reports 69 septic abortions per 1000 births in 1967 and 22 per 1000 in 1969.¹²

It is safe to say that 50 to 70 percent of women now receiving legal abortion would have resorted to illegal pregnancy termination. The decline in illegal abortion deaths and the marked diminution in hospital admissions for incomplete and septic abortions in both New York and California offer strong evidence of a reduction in illegal abortion.

There are two social by-products of liberal abortion I should like to mention. One is its effect on illegitimate births. New York City began to record illegitimate births in 1954, and every year until 1971 the number increased annually by the rate of 5 or 6 percent. In 1971, the first full year of liberal abortion, the number of out-of-wedlock births actually decreased 11.5 percent. A second fact of social importance is the decrease in babies left in the hospital, deserted by their mothers. At King's County, this figure has declined over 50 percent and similar results are reported from Harlem Hospital.

Before concluding, I should like to discuss a few other points. Among them, the claim that therapeutic abortion has serious psychic sequelae for the women. There is no scientific evidence to support this. Dr. Zigmond Lebensohn, Chairman of the Committee which wrote the report, *The Right to Abortion*, for the Group for the advancement of Psychiatry, states in an article published in 1972, "I have found no convincing evidence of psychiatric complications in well-motivated women who obtained a legal abortion. For most women faced with an unwanted and unplanned pregnancy a legal abortion is, in fact, truly therapeutic."¹³ Skillful, pre-abortion counselling by trained counsellors which I heartily recommend can and will do much to minimize psychic trauma.

The Supreme Court in establishing the right to freedom of choice in abortion wisely protects the rights of the individual who opts against abortion and the medical personnel which choose not to participate in an abortifacient operation. Under no conditions can any pregnant woman be compelled to undergo abortion against her will, and furthermore no physician, no nurse and no other medical personnel can be forced to take an active role in the performance of abortion.

One hears the fear expressed that once abortion becomes widely available the employment of effective contraception will be broadly abandoned. According to Tietze's study of the impact of a liberal abortion law on fertility trends in New York City, indeed, the reverse may have been true. He writes, "There is no indication that easier access to legal abortion has led to a widespread deterioration of contraceptive practice. On the contrary, indirect evidence suggests that overall contraceptive practice improved markedly between the first and second years of the liberalized law, perhaps related to the contraceptive counselling which is provided in most of New York's well run abortion services."¹⁴

Finally, when do I believe life begins? To me life is a continuum which commences before fertilization, for if both egg and sperm were not living cells there could be no fertilization. Fertilization is a way-station in the creation of a potential life, and each week and month in the process of fetal development is similarly a way-station. Personhood does not commence until the fetus is born sufficiently mature to survive outside of its mother's body. Individuals subscribing to this philosophy cannot be correctly charged with lack of regard for the sanctity of life. True respect for life demands that every child be born with the invaluable heritage of a sound body and mind and be earnestly wanted by parents capable of caring for it.

As an obstetrician-gynecologist with decades of experience in the field of abortion, I strongly support liberal abortion. Any limitation on freedom of choice in the matter of abortion is retrogressive from the medical and social points of view. I willingly accept medical safety regulations as suggested by the Supreme Court decision, but they must not be ill-used to thwart freedom of choice to allow socio-economic discrimination.

¹² Stewart and Goldstein, "Therapeutic Abortion in California," *Obstetrics and Gynecology*, 37:510, 1971.

¹³ Lebensohn, Z., "Abortion, Psychiatry and the Quality of Life," *American Journal of Psychiatry*, 128:60, 1972.

**STATEMENT OF ALAN F. GUTTMACHER, M.D., PRESIDENT OF
PLANNED PARENTHOOD-WORLD POPULATION, PLANNED PAR-
ENTHOOD FEDERATION OF AMERICA, INC., DIPLOMATE IN
OBSTETRICS AND GYNECOLOGY**

Dr. GUTTMACHER. I am going to testify first if I may, sir, and I appreciate deeply being summoned by the committee.

I am a physician and my liberal attitude toward abortion, my applauding the excellent decision by the Supreme Court, is the result of rich and deep personal experience with the problem of abortion over a half century in medicine.

When I was taught obstetrics at the Johns Hopkins Medical School, my alma mater, the law of the State of Maryland forbade abortion unless it was necessary to save the life of the mother.

As a student, I thoughtlessly accepted this attitude, but during my days of obstetrical residency training and practice, I began to realize that this attitude was far from nondiscriminatory, far from practical.

Deaths are very impressive to the physician and my attitude was changed by the death of a young 15-year-old girl who had a badly bungled abortion and was brought to the Hopkins mortally ill. The question was whether we should operate and remove all of her pelvic organs or simply pray to restore her to health. We chose the former and she died 4 or 5 hours later.

I remember vividly a woman who had aborted herself or been aborted who was the mother of four children who unusually remained totally conscious within minutes of death and kept pleading for life for her children's sake.

Perhaps the thing that changed my attitude most materially was the fact that a young 12-year-old black girl was brought to me by the social services department in order to have a legal abortion because she had been impregnated by her father. He was languishing in jail indicted by the grand jury.

When I proposed to my chief of obstetrics, Dr. Williams, that I be permitted to abort this child, he reminded me that the abortion was not necessary to save the life of the mother and therefore under the State law I could not do it.

At the same time in a neighboring hospital, I was shown the adolescent white daughter of a colonel from Washington who had been impregnated and had been legally aborted. These experiences made me think that the law which we had in Maryland was impractical and highly discriminatory.

There is no doubt that previous to liberalization of abortion, legal abortion, was highly discriminatory and perhaps even more discriminatory than illegal abortion.

Legal abortion studies have shown that the private patient and the white patient were accepted for abortion much more than the ward or clinic patient and certainly there was a great ethnic difference.

There is a study by Dr. Robert Hall from Columbia, Presbyterian Hospital in New York showing that in a 32-year period, 1938-1970, the abortion ratio was six and a half times higher on the private than on the ward service.

A study in New York City, between 1960 and 1962, showed that proprietary hospitals had 3.9 legal abortions per thousand births; a ratio among private patients of voluntary hospitals of 2.4; and ward patients of the same hospital 0.7; while in municipal hospitals it was 0.1, that is, one abortion to 10,000 births.

In other words, proprietary hospitals had 40 times the legal abortions that a municipal hospital had. There was marked ethnic difference also.

In New York in 1960 and 1962, the rate of legal abortions among whites was five times that among blacks and 25 times that of Puerto Ricans.

I quickly came to the conclusion that legal abortion was a highly discriminatory procedure before its liberalization.

I need not remind you that illegal abortion is even more discriminatory because the ability to pay, the size of the pocketbook meant safety or sometimes death.

If a woman had sufficient funds, she could get a clandestine doctor to do the procedure or get a plane to Japan and have the procedure done there.

The woman who had a scant amount of money had to use the services of a paraprofessional like a midwife and the woman who had no money had to abort herself or have a neighbor help with the procedure.

I, therefore, came to the conclusion that restrictive abortion statutes were impractical and highly discriminatory.

I wanted to see them reformed.

I must admit I had uncertainties about how the law should be reformed. I wanted it reformed on three grounds.

First, to promote safety, that is lower mortality and illness; and, second, to eliminate discrimination; and third, to curtail the third largest racket in America, illegal abortion.

I thought perhaps that the bill of the American Law Institute (ALI) presented by Prof. Herbert Wechsler might be the answer. I was present when he presented his model bill which, as you know, allows abortion to preserve life or health, for genetic reasons and for pregnancies engendered by sex crimes.

I heard him present his bill quite proudly. There was an elderly gentleman in the room who was listening intently and when Professor Wechsler finished, the elderly gentleman, who was Judge Learned Hand, said, "That is a damned bad bill."

Wechsler said, "Why, sir?"

Judge Hand replied, "It is too damned conservative."

Of course that is true.

When you have partial liberalization of abortion, you don't accomplish the goals I seek.

We have had the remarkable experience in New York of having a very liberal abortion statute for over 2 years, which greatly resembles the decision of the Supreme Court on abortion. In New York, any woman can be aborted who desires it provided she is less than 24 weeks pregnant, and the procedure is carried out by a licensed physician.

Our results have been startlingly good.

I would like to measure them against the three criteria that I have enunciated.

What has it done to preserve life? Previous to the enactment of the liberal New York law, we had 45 deaths in a 2-year period from illegal abortion.

Subsequent to the enactment, the deaths from illegal abortion have dropped in a 2-year period to 13 from 45.

In California previously to the enactment of their liberal law they had 27 deaths in 1967, from illegal abortion; in 1971, five deaths from illegal abortion.

Hospital admissions for incomplete abortions, that is, abortions often started by the individual or by someone else and the patient then comes to the hospital to have the initial abortion completed, have declined 20 percent.

We also find that the incidence of septic abortions has been greatly reduced. Septic abortion at San Francisco General Hospital has dropped from 69 per thousand deliveries to 26 per thousand deliveries.

Therefore, on the basis of preserving health and life I think that we can say that a very liberal abortion policy does both.

In regard to discrimination, it would interest you, I think, that during the last 3 months for which I have figures for New York City residents April to July —1972—47 percent of the legal abortions were done on black women, while they produce only 30 percent of the babies; 42 percent of the abortions were done on white women, and they produce 54 percent of the babies; and 11 percent were done on Puerto Rican women, and they produce 16 percent of the babies.

Therefore, with the New York statute and with the excellent implementation by the medical profession of that statute in New York City, we have found almost total eradication of discrimination.

When it comes to the third parameter, what is it doing to illegal abortion, there is much evidence that we are greatly destroying this nefarious racket.

There are some other interesting social results of very liberal abortion. We have noted since 1954, when the records were first kept that in New York City, the out-of-wedlock births increased with cruel consistency at the rate of 5 to 6 percent per annum.

Since we have legal abortion the rate has dropped 11 and a half percent.

At the Kings County Hospital, a great municipal hospital, they have studied those babies abandoned by mothers. It is not uncommon for a woman who has an unplanned and unwanted baby to have someone meet her in the hall, throw a coat over her hospital gown and walk out and abandon her baby.

This occurred 14.9 times per thousand deliveries at Kings County Hospital previous to the passage of the New York State liberal abortion law, and now it happens in 6.6 per thousand deliveries, a decrease of 56 percent.

I am strongly of the opinion, sir, that partial liberalization is not the answer. I strongly feel that the Supreme Court was utterly, completely and totally right in their decision on abortion laws.

I realize that there are other points of view about the situation. I am sure that some would question my attitude toward life.

The question as to when life begins was considered by the Supreme Court and they came to the conclusions that biologists and jurists and theologians had no answer to this.

My own feeling is that life begins before the actual process of fertilization; that you have a living cell and a living sperm. If they were not living, you could not have fertilization.

I view fertilization simply as a way station on the development of life.

Mr. BLAKEY. Doctor, could I ask you a question there?

Dr. GUTTMACHER. Why, certainly, sir.

Mr. BLAKEY. I must apologize initially for not having the opportunity to read at greater length and study your comments.

I would like, if you are willing, to forward you a letter and ask you some more medical-type questions about your comments.

But I was somewhat intrigued by your description of life as a process and I would like to explore that idea with you a moment.

As I am sure you are aware, the legal profession has to depend on the medical profession for the factual information on the basis of which it furnishes rules, and in this context, as I am sure you are aware, the traditional definition of death that the legal profession has adopted at the urging of the medical profession has dealt with circulation, when the heart ceases to beat. That has been thought to be the definition of death.

In recent years the medical profession, largely as the result of a transplant issue, has urged on the legal profession a definition such as brain death, the thought being that once the brain is dead, that the person ceases, even though it is clear that the body remains alive.

It is possible with medical techniques for the body to go on.

I am wondering if it isn't an analogy as to your analogy of life as a way station? The person, in the case of a transplant, the brain is dead although the heart may remain alive and the vital organs remain alive?

This is a crucial question in surgery and also in homicide. If a doctor took a heart out of a patient who was still alive, he might have a question of homicide.

Dr. GUTTMACHER. I think you are talking about living matter and life. I agree with the court that the fetus has no personhood, it only possesses the potential for life; it does not have life until it is born and is capable of surviving outside of the uterus.

Mr. BLAKEY. My point was, I was wondering if we could use as a test for the absence of personhood in human life the presence of brain waves?

Dr. GUTTMACHER. I am not sure these are totally analogous. Brain waves probably appear fairly early in the fetus, 12 to 15 weeks, I guess.

It develops a more characteristic wave later on.

Mr. BLAKEY. Is it possible to test the brain waves of a developing fetus?

Dr. GUTTMACHER. You can have a live fetus born through spontaneous abortion and you can test the brain waves. I am sure this has been done.

Mr. BLAKEY. Is it possible to test a fetus' brain waves?

Dr. GUTTMACHER. After the delivery?

Mr. BLAKEY. Prior to delivery.

Dr. GUTTMACHER. You can do it in experimental animals—you can put the whole animal in a water bath and keep the temperature warm and incise the uterus and take the fetus out and make observations and later restore the fetus to the uterus and sew it up.

Mr. BLAKEY. How early would you expect to find brain waves in a human fetus?

Dr. GUTTMACHER. I would guess in the area of 12 to 15 weeks.

Mr. BLAKEY. Would it be possible to say the developing child is sensate, capable of feeling pain?

Dr. GUTTMACHER. Pain? Oh, yes.

When a child is born by the breech, even a very small fetus and one pinches the toe of the protruding foot, it will retract the foot. I have observed this at 14 or 15 weeks.

Mr. BLAKEY. Would this pain be experienced independent of the mother?

Dr. GUTTMACHER. Yes; however it is still dependent upon the mother because it's fetal circulation is intact.

Mr. BLAKEY. Would the child feel pain from the environment?

Dr. GUTTMACHER. Whether the child feels pain or pressure can't be determined. We actually aren't assaulting a child. We are simply squeezing a toe.

Mr. BLAKEY. Thank you, doctor.

Senator HRUSKA. Perhaps you would have some comments on this subject at this time, Mrs. Pilpel?

I understand you will present the legal aspects of the legalization as contrasted with the medical aspects as discussed by Professor Guttmacher.

Mrs. PILPEL. Thank you, Senator.

**STATEMENT OF HARRIET F. PILPEL, ESQ., GENERAL COUNSEL,
PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.**

Mrs. PILPEL. Thank you, Senator.

It is a privilege to be here.

As far as the legal aspects are concerned in the decision of the U.S. Supreme Court in the Texas¹ and Georgia² abortion cases—which I hope to present when it is my turn—the Court specifically addressed itself to the question of when life begins and traced the histories of various beliefs and doctrines of religious and other groups and came to the following conclusion:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary at this point is not in a position to speculate as to the answer.

The Court then went on to say that as far as constitutional law and the Fourteenth Amendment are concerned, a fetus is not a person.

In support of that conclusion, the Court reviewed the legal precedents and the treatment of the fetus by law.

¹ *Roe v. Wade*, 410 U.S. 113 (1973).

² *Doe v. Bolton*, 410 U.S. 179 (1973).

I am sorry I can't comment on the factual aspects. If Dr. Guttacher doesn't consider himself competent, I can assure you I am several thousand degrees below him in competence.

MR. BLAKEY. Mrs. Pilpel, would it be necessary to find that a human being was a person before you could extend protection of the law?

Isn't it true it was homicide in that very dark day when we had slavery to kill slaves, although they were not considered persons in law?

MRS. PILPEL. They were considered persons, Mr. Blakey. They were not considered citizens.

I don't think anybody denied that they were persons.

MR. BLAKEY. I thought they were considered chattels.

MRS. PILPEL. They were persons and property, but they were definitely not citizens. Although their personhood was not denied, they were treated also as if they were a species of property.

MR. BLAKEY. When you shot one of them, it wasn't destruction of property; it was homicide; wasn't it?

MRS. PILPEL. Yes; that is because they were persons; whereas the destruction of a fetus even under the strictest laws has not been considered murder. There have been very recently in the history of the western world the offenses of abortion, but abortion has never been considered to be the same as murder.

Indeed, a recent case in California held that the deliberate destruction of the fetus by what I will describe as vicious means, namely, a man kicking his wife in the abdomen, was not murder.

MR. BLAKEY. That case was reversed, was it not?

MRS. PILPEL. The case remains and for that intent is still good law. However, the California legislature has now, in response to this case, adopted a statute which now applies only to the situation where with "malice aforethought," et cetera, the child is destroyed by such acts on deliberate assault on the mother.

In any event, the entire history of Anglo-American jurisprudence is contrary to this statute as far as abortion is concerned.

The statute was passed to cover the situation of a man brutally kicking the woman in the stomach for the purpose of killing something inside her in her late pregnancy.

MR. BLAKEY. The legislature passed the homicide statute?

MRS. PILPEL. Yes; the U.S. Supreme Court decisions in the Texas and Georgia cases permit States to pass laws even prohibiting abortion in the last trimester of pregnancy provided only that exception is made for the life and health of the mother.

MR. BLAKEY. Nothing further.

Senator HRUSKA. Thank you very much.

Anything further, Mrs. Pilpel?

MRS. PILPEL. Would it be all right, Senator, and Mr. Blakey, if I made my initial presentation, if I went back to the beginning, because I think this whole question should be viewed in its legal aspects before it comes before this committee?

MR. BLAKEY. I wonder, Mrs. Pilpel, in order—I have had time to read your statement and since it deals more with law than medicine, I wonder if you would consent to submit that statement and respond to several questions on it, since as I understand it, it simply reviews

the legislation before us and possible implication of the Supreme Court's opinion on the legislation before us?

Mrs. PILPEL. Yes, and traces the history of both the legislation on the subject and the Supreme Court opinion on the subject.

Mr. BLAKEY. Is it a fair summation of your statement to say that it indicates the parameters of the committee's freedom to draft legislation in this area is sharply limited by the Supreme Court?

Mrs. PILPEL. Yes, that is one of the conclusions I drew.

It also seems to me that it is clear that the present drafts of both S. 1 and S. 1400 are in accord with the Supreme Court opinions because they define a "human being" as a person who has been born and is alive. As you just pointed out, what the States can do with respect to abortion is limited by the Supreme Court decisions which also would apply to the Federal law.

Therefore, it is our view there is no need for, and it would be undesirable to include, the subject of abortion specifically in this statute.

Mr. BLAKEY. If people disagree for whatever reason with the Supreme Court's decision, do you see any way to change it except by constitutional amendment?

Mrs. PILPEL. No, I don't think anyone sees a way to change it except by constitutional amendment.

On April 26, the three-judge district court in Connecticut threw out the Connecticut case which has been shuttling back and forth between Connecticut and Washington, and made perfectly clear that the attempt by Connecticut to avoid the U.S. Supreme Court's decisions had been unsuccessful.

But I would like to point out that the Supreme Court decisions do not require anybody to have an abortion and do not require anyone to participate in an abortion procedure.

It seems to me the significance of the Supreme Court decisions is that they recognize and declare a fundamental freedom, namely, the freedom to decide whether to have a child or an abortion.

Consequently, I don't see any necessity in attacking the decisions since they leave total freedom of choice to everyone in this country as to whether to have an abortion or not.

Mr. BLAKEY. Let me ask you this:

On the philosophical and legal dimensions of the position that you are advocating, do I understand you really to be saying that what you want as a legal matter is a woman to be free not to have to carry the child? You don't insist that she also have the right to destroy the developing child if it were medically possible to take the fetus at any stage of its development out of the mother and make it independently viable through medical means?

Would the type of position that you advocate in favor of abortion object to that?

Mrs. PILPEL. I think you are posing a position that is very far-fetched and would be more appropriately discussed by Dr. Guttmacher.

Mr. BLAKEY. The only question I am asking is: Do the people who suggest that we ought to have an abortion argue that they don't want to carry the children or rather, they want to destroy them?

Dr. GUTTMACHER. Obviously, they don't want to carry the child, but if the price for not carrying them is a serious or dangerous operation which removal of an early living fetus would be—while abortion is a relatively simple and safe procedure—you would not be giving the woman a great deal of choice if you were demanding she have a serious operation or carry the child.

Those alternatives would be unacceptable.

Mr. BLAKEY. I take it the Supreme Court's definition of legal personhood is viability, and viability could be a medical question?

Mrs. PILPEL. I really disagree. I think the Supreme Court held a fetus is not a person for the purposes of the 14th Amendment under any circumstances, and therefore, the law this committee has adopted defines human being as a person who has been born and is alive.

What the Supreme Court said is that the State may take into consideration the potentiality of human life present in the fetus after viability but not that it was a person before birth.

Mr. BLAKEY. If the State interest in viability could preclude totally third trimester abortion, if medical knowledge moves back the time of viability, approximately to conception, and the States were willing to enforce that judgment by statute, do you see any constitutional objection?

Dr. GUTTMACHER. My attitude is that the quality of life is all important and to have a child rejected by the mother gives the child a very poor chance to be raised wanted, desired or loved.

To accomplish what you are talking about, having a fetus of 12 weeks raised outside of the mother to become a baby, would simply multiply the number of unwanted children and thereby reduce the quality of life.

Those of us who are interested in abortion are interested very zealously in the quality of life, and we feel the quality of life is greatly enhanced if a child is born with a sound body and mind and born to parents who are responsible and earnestly anxious to have a child born to them.

When this is negated, the quality of life is hampered and sometimes destroyed.

Mr. BLAKEY. Perhaps I am falling into what very often happens when counsel raises questions with a medical witness or legal witness. Please don't infer that my questions presuppose an attitude of my own. I am simply trying to test the parameters of the questions you have advanced. My personal feelings are really quite irrelevant.

Would it be fair to say that what you are saying, then, is that you wouldn't be satisfied with simply expelling the child. What you want to do is terminate its existence?

Dr. GUTTMACHER. If the mother desires to have termination of pregnancy, I think for the good of the child the process should be carried out.

Mr. BLAKEY. Thank you, doctor.

I have no further questions at this time.

Dr. GUTTMACHER. We have some unpleasant pictures here of bungled abortions.

We will introduce these into the record.

Senator HRUSKA. We can accept them for the files of the committee, doctor.

Thank you very much.

[Full text follows:]

STATEMENT OF HARRIET F. PILPEL, ESQ., GENERAL COUNSEL, PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.

I. INTRODUCTION

I, Harriet F. Pilpel, am a senior partner of the law firm of Greenbaum, Wolff & Ernst in New York City.

Our firm is general counsel to Planned Parenthood Federation of America, Inc. and also represents other groups interested in the subject under consideration by the Committee at this time.

We have been asked to discuss the proposed "Criminal Justice Codification Revision and Reform Act of 1973" (S.#1), as it relates to the general subject of abortion. We take as our point of reference Senator McClellan's observations in his statement to the Senate on January 12, 1973 (Congressional Record, January 12, 1973). Senator McClellan noted that there is no general criminal abortion provision in the present Title 18, that the report of the Brown Commission contained no proposal for a criminal abortion provision and that there is no such provision in the proposed Criminal Justice Codification Revision and Reform Act of 1973.

Senator McClellan went on to describe the alternatives which were then apparently open to the Congress in this connection referring to the possible choices: on the one hand explicit decriminalization of abortion; on the other explicit criminalization of abortion; or finally leaving the resolution of this question in each enclave area to the states to apply their local law.

II. THE CONSTITUTIONAL RIGHT OF ABORTION

The United States Supreme Court has now substantially determined the questions posed by Senator McClellan. On January 22, 1973, the Court decided the cases of *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973). We believe that for the question under consideration by this Committee, the *Roe v. Wade* decision is dispositive. That case was decided by a majority of seven justices. The majority opinion was written by Mr. Justice Blackmun and concurred in by the Chief Justice and Justices Douglas, Brennan, Stewart, Marshall and Powell. Justices White and Rehnquist dissented. The decision followed two oral arguments before the Court, the first of which was held before the seven judge Court which heard the case before the appointment of Justices Powell and Rehnquist and the second of which was heard by the full nine judge Court, including those Justices.

The Court held that the right of personal privacy guaranteed under the Fourteenth Amendment to the United States Constitution "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." It decided that this right is "a fundamental right" which may be limited only by a "compelling state interest." It also held that a fetus is not a person within the meaning of the Fourteenth Amendment: "... the word 'person', as used in the Fourteenth Amendment, does not include the unborn."

The *Roe v. Wade* holding followed from many prior opinions of the Court going back to a case decided in 1886 (*Boyd v. United States*, 116 U.S. 616, 630). As stated in the Court's opinion in *Griswold v. Connecticut* which was the culmination of the earlier cases: "These cases bear witness that the right of privacy which presses for recognition here is a legitimate one."

Roe v. Wade made clear that the criminal abortion statutes in effect in most of the states at the time of that decision were invalid. The Court held that up to approximately the end of the first trimester of pregnancy the government cannot restrict a woman's decision to have an abortion and that "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." The Court further held that following the first trimester and during the second trimester of pregnancy, the government still may not limit the grounds for abortion but said that "the state, in promoting its interest in the health of the mother, may, if it chooses, regulate the

abortion procedure in ways that are reasonably related to maternal health." Finally, the Court held that beginning approximately with the end of the second trimester, "subsequent to viability", the state may, if it chooses "in promoting its interest in the potentiality of human life . . . regulate and even, proscribe abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."

Thus it is clear that the government may not make abortion, when performed by a licensed physician, criminal during the first two trimesters of pregnancy. States may limit the grounds for abortion in the last trimester but not so as to prevent a woman from securing medically approved abortions to protect life or health.

The Texas law at issue in *Roe* forbade abortion except "for the purpose of saving the life of the mother." The United States Supreme Court decision invalidated similar laws in thirty states.

At the same time the *Roe v. Wade* case was decided, the Court also decided the companion case of *Doe v. Bolton* which along with *Roe* made clear the invalidity of the laws in those states which limited the permissible grounds for abortion during the first two trimesters of pregnancy or which limited more narrowly than permitted under the *Roe* decision permissible grounds for abortion in the last trimester of pregnancy.

Doe v. Bolton involved the Georgia abortion statute which permitted abortions by licensed physicians to protect the life or health of the woman, where the fetus was likely to be born with a serious defect or where the pregnancy resulted from rape. These restrictions on a woman's right to decide whether or not to terminate a pregnancy had been held invalid by the lower court. That was also the holding of the United States Supreme Court which in addition, held unconstitutional a number of other requirements of the Georgia law on the ground that they were not reasonably related to maternal health. Among these were a requirement that abortions be performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals, that abortions be approved by a hospital committee and that two additional physicians confirm a woman's need to have an abortion. The Court further held that the Georgia law's provision restricting abortions to residents of that state was in violation of the right to travel guaranteed by the Constitution under Article IV, §2.

On February 26, 1973 the Court denied petitions for rehearing in both of these cases (41 U.S. Law Week 3463, Feb. 27, 1973). At the same time it issued orders in twelve other abortion cases from other states which were pending before it. (41 U.S. Law Week 3462, Feb. 27, 1973). In most of these the Court remanded the case to the lower courts for decision in light of its holding in *Roe v. Wade*. In one of these cases, *Byrn v. New York City Health and Hospitals Corporation*, the court dismissed an appeal on behalf of the interests of fetuses from the decision of the Court of Appeals of the State of New York (New York's highest court) on the ground that it did not present a substantial federal question. One of the cases which the Supreme Court remanded to a lower court for further consideration in light of *Roe v. Wade* was *Markle v. Abete*, which held invalid a 1972 Connecticut abortion law containing a recital that the intent of the Legislature in passing the law was "to protect and preserve human life from the moment of conception." A petition for rehearing on the Supreme Court's decision thus to remand the case was filed by the State of Connecticut urging the constitutionality of the law. This petition was denied by the United States Supreme Court on April 16, 1973. 41 U.S. Law Week 3554 (April 17, 1973).

An essential basis for the Court's decision in all of these cases was its determination that the fetus is not a "person" within the language and meaning of the Fourteenth Amendment. In reaching this conclusion the Court analyzed relevant provisions of the Federal Constitution, lower state and federal court cases which had considered this question, the history of abortion law in this country and in other countries going back to Greece and Rome and the varying philosophical approaches to the concept of life. The Court noted and answered the argument of Texas in the *Roe v. Wade* case that:

" . . . life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this

point in the development of man's knowledge, is not in a position to speculate as to the answer."

The Court added that:

"It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question. There has always been strong support for the view that life does not begin until live birth. This was the belief of the Stoics. It appears to be the predominant, though not the unanimous, attitude of the Jewish faith. It may be taken to represent also the position of a large segment of the Protestant community . . ."

Discussing areas other than criminal law the Court pointed out "the law has been reluctant to endorse any theory that life as we recognize it begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth." The Court found that no case has ever held that a fetus is a person within the meaning of the Fourteenth Amendment and that "the unborn have never been recognized in the law as persons in the whole sense." The Court concluded that "the word 'person' as used in the Fourteenth Amendment does not include the unborn." Thus the Court's decision in *Roe v. Wade* is to the same effect as the provision of the proposed Code this Subcommittee is considering which defines a "human being" as a person "who has been born and is alive."

Roe v. Wade and *Doe v. Bolton* also support the Code's omission of any provision respecting abortion. Since it is now definitely established that women (with their physicians) have a constitutional right to abortion subject only to certain limited regulation by the states, there is clearly no constitutional basis or policy need for any federal legislation in this area.

Indeed there is very limited basis for any government regulation in connection with abortion except in the third trimester where the legislation may not be to the detriment of the life or health of the mother. Under the United States Supreme Court opinions the only state regulation permitted in the second trimester must be "reasonably related to maternal health." A number of states and some municipalities have enacted or are considering enacting such legislation dealing with such matters as the appropriate physical facilities for the performance of abortion which, of course, does not involve any federal concern. With reference to the first trimester, it is the woman's decision to have an abortion and the "medical judgment of her physician" which are determinative without state interference. In view of this posture of the matter any federal legislation in this area would be an anomaly.

III. THE OLD FEDERAL LAWS ON ABORTION

We note that the adoption of the proposed Code would eliminate such vestigial federal criminal laws as now exist with respect to abortion. It would, for example, eliminate Section 1461 of Title 18 of the present Federal Code which imposes fine and imprisonment for using the mails for delivery of articles for producing abortion or information directly or indirectly giving information about abortion and Section 1462 of Title 18 which imposes fine or imprisonment for shipping by common carrier in interstate or foreign commerce articles designed or intended for producing abortion or materials giving information, directly or indirectly, with respect thereto. (Related but non-criminal federal laws are 19 USC 1305 relating to importation of materials and 39 USC 3001(a) relating to nonmailable matter.) It is apparent that these federal criminal laws serve no purpose and are in any event unconstitutional under the recent Supreme Court decisions as well as the applicable decisions of that Court construing the First Amendment.

It is clear that such federal legislation cannot stand against the now established federal constitutional right of abortion. Even prior to the *Roe v. Wade* decisions, these laws applied only to "unlawful abortion". [*Bours v. U.S.*, 229 Fed. 960 (7th Cir. 1915)] Thus they were at the very least ambiguous and confusing before the recent Supreme Court decisions in the abortion cases made them unconstitutional as violative of the constitutional right of privacy.

Moreover, insofar as the old laws prohibit dissemination of information about abortion they were and are patently unconstitutional under the First Amendment. Indeed the comparable civil provisions affecting dissemination of information about abortion contained in 39 USC § 3001(a) had prior to the

Wade and *Bolton* decisions been held to violate the First Amendment in *Atlanta Cooperative News Project, et al. v. U.S. Postal Service, et al.*, Civil Action No. 16538, U.S. District Court N.D. Georgia, September 29, 1972 (3 judge court). This result necessarily followed from numerous prior decisions of the United States Supreme Court including *Kingsley International Pictures Corp. v. Regents of New York*, 360 U.S. 684 (1959); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Yates v. United States*, 354 U.S. 298 (1957) etc.

IV. SUMMARY

In summary, we wish to state our support of the decision of the Subcommittee to omit from the proposed Code any provision respecting abortion. If there is no federal law on the subject the laws of the states will apply to federal enclaves and such state laws must of course conform to the applicable principles as declared by the United States Supreme Court decisions in *Roe v. Wade* and *Doc v. Bolton*.

Senator HRUSKA. Our next witness and final witness for today is Mr. Mark Crane, representing the Section of Antitrust Law of the American Bar Association.

Will you identify your colleague and assistant?

STATEMENT OF MARK CRANE, MEMBER OF THE COMMITTEE ON CRIMINAL PRACTICE AND PROCEDURE OF THE ANTITRUST SECTION OF THE AMERICAN BAR ASSOCIATION; ACCOMPANIED BY FRANCIS McDERMOTT

Mr. CRANE. Francis McDermott of the Washington office of my law firm, Senator.

Senator HRUSKA. Very well. Good to have you here, Mr. McDermott.

Mr. CRANE. As you have already observed, I am a member of the Antitrust Section of the American Bar Association and a member of its Committee on Criminal Practice and Procedure.

The Committee has prepared and submitted to the staff a report which was approved by the Council of the Antitrust Section.

The only copies of that report in Washington appear to be in resolution form. It has been prepared in text form and I would like leave to submit, after my testimony is concluded today, a copy of that official report for the record.

[For report see p. 5609.]

Senator HRUSKA. Well do you represent the Committee by way of delegation for presentation of its views as reflected in that report, or do you express personal views?

Mr. CRANE. I do both. I do represent the Committee for presentation of its views as reflected in that report by specific delegation of the chairman.

On the other hand, that report addressed itself to the Brown Commission report and not specifically to the legislation you are considering.

There are a number of additional problems with the legislation which I would like to discuss and, to the extent they are different from the problems in the Brown Commission report, my statement on those problems will have to be treated as my own.

I have prepared a written statement on my own behalf of those views, which, at the end of my testimony, I would like to have made

a part of the record if that is possible. Then I can simply summarize the highlights for you orally.

Unlike the other witnesses you have heard today, I have to cover a whole panoply of provisions, and if you wish to break in with any questions—

Senator HRUSKA. May I say we are laboring under some time limitations. You can have 40 minutes.

Your statement is quite complete and will be considered carefully.

You may proceed to highlight it.

Mr. BLAKEY. Anything that you don't finish, would you be willing to respond by letter?

Mr. CRANE. I certainly would, Mr. Blakey.

I would like to discuss first some problems in the conforming amendments to S. 1 which specifically amend the Sherman, Clayton, and Robinson-Patman Acts.

First, there is a provision in section 316(a)(2) of S. 1, which would delete the phrase "attempts to monopolize" from the Sherman Act.

There is provided by the Clayton Act a treble damage remedy available to the victims of any violations of the antitrust laws.

The antitrust laws are defined to include the Sherman Act, but would not include any general attempt section—

Mr. BLAKEY. Could that be met if the language was restored and the word "attempts" stricken and the word "endeavors" substituted for it and if the legislative history made clear that "endeavors" was to carry with it the same meaning that the word "attempts" has in the present statute?

Mr. CRANE. I believe the treble damage remedy would be lost if "attempts" were deleted and nothing put in its place. But your suggestion would remedy that problem.

The second problem is that the conforming amendments in S. 1 would make all violations of the Clayton and Robinson-Patman Acts criminal offenses. What the conforming amendments in sections 316(c) and 316(d) do, is to amend present criminal provisions in each of those acts which apply to only one section in each of those acts so that any violation of any section of each of those acts would become a criminal offense.

This would make any price discrimination a criminal violation, any illegal merger a criminal violation, any illegal exclusive dealing contract a criminal violation, and any illegal interlocking directorate a criminal violation.

Mr. BLAKEY. This could be met by substituting the word "section" for the "act," in those conforming amendments, with cross-reference by numbers.

Mr. CRANE. Yes, if you limit the criminal sanctions to the sections that are meant instead of to the whole act, my problem is solved.

Third, the conforming amendments take antitrust offenses, which are now either characterized specifically as misdemeanors or carry penalties considered as misdemeanor penalties, and characterize them as felonies—

Mr. BLAKEY. Is there any change in the penalties as such?

Mr. CRANE. No change either in S. 1 or S. 1400, and S. 1400 would leave them characterized as misdemeanors.

Mr. BLAKEY. Do you think if Congress made an explicit statement that no change in collateral consequences was intended that would obviate your objection?

Mr. CRANE. I am not sure it would because the collateral consequences are the result of State law, and I don't know whether congressional intention would bind the States to limit the consequences that would follow from a felony conviction or whether such a conviction would still result in the collateral consequences provided under State law.

Mr. BLAKEY. Wouldn't Congress have power to control collateral consequences of violations of Federal law?

Preemption would clearly apply, wouldn't it?

Mr. CRANE. I suppose you are right insofar as you are talking about the Federal consequences, but there are certain things left basically to the States.

Mr. BLAKEY. Not if Congress doesn't let the States do it.

Mr. CRANE. Let's suppose we have the right to vote in a State election, which is sometimes taken away by the State if a citizen is convicted of a felony. I am not sure that Congress can or should interfere with the States rights to set the standards—

Mr. BLAKEY. That would be a question we would have to work out by interpretation.

If the committee were to decide there would be no question about congressional intent to control it and that were expressed and that was correct, would that meet your point?

I take it you are troubled by the probable collateral consequences of changing the definition of the word "felony."

The thought behind it was to make it comport to—to make a meaningful distinction between felony and misdemeanor—and there was no thought it should change the collateral consequences. Insofar as collateral consequences are the source of your objection, if legislation was developed and it was within the power of the Congress, I take it that would meet your objection?

Mr. CRANE. If Congress has that power, it would meet my objection insofar as we are talking about collateral legal consequences, but there are collateral legal and collateral social consequences of a man being a convicted felon. The social consequences would remain unchanged.

My preference, frankly, would be the position taken in S. 1400, which would leave them as misdemeanors.

Mr. BLAKEY. Fine, thank you.

Mr. CRANE. The next subject to which I would like to address myself is the impact of S. 1 and S. 1400 on corporate retention and disposal of record programs.

Both of these bills would expand the criminal consequences of the disposal of corporate records, and they do it in two quite different ways:

S. 1 would amend the Federal Trade Commission Act to provide that the consequences attendant to destruction of an official Government document would apply to any document which was kept by a corporation subject to Federal Trade Commission jurisdiction.

We respectfully suggest this is much too broad since that would be all corporate records of every corporation except banks and certain common carriers.

We would urge the language be changed to have included, in the proposed amendment to the Federal Trade Commission Act, the phrase "required to be kept by the Act or the Commission."

I believe this would be consistent with present law and would permit corporations to engage in their present record retention and disposal programs.

S. 1400 tries to get at the same problem in a different way by making it a crime to dispose of or alter records with the intent that they not be available in an official proceeding whether or not pending or about to be commenced at the time that the records are disposed of.

Our problem was with the phrase "whether or not pending or about to be commenced."

The problem is that an official proceeding has a very broad definition, including proceedings before notaries public.

We believe that, as drawn, the provision in S. 1400 would apply to the disposal of any document which might be relevant or might lead to relevant evidence in any future antitrust case that at some future time might be filed—

MR. BLAKEY. I take it you think the scope of that should be narrowed so that it is reasonably pendable or reasonably foreseeable rather than any proceeding at any time?

MR. CRANE. There are two ways you could narrow it which would be helpful.

One would be to limit it to proceedings which are pending or which the person destroying the documents has reason to believe would soon be instituted.

The second way would be to limit it to true official proceedings, that is, proceedings brought by the Government, and not, by picking up the phrase notaries public, have it apply to any proceedings brought by private party.

The problem is, you often have a disgruntled distributor or competitor call up and complain about something you are doing, call up and say if you don't change it, he is going to sue you.

Sometimes he does and sometimes he doesn't.

If you simply amend the section to provide that a person disposing of the documents is guilty of a crime if he has reason to believe that an official proceeding will soon be instituted and don't also limit official proceedings to those brought by the Government, there will be many times when documents could not be destroyed because a person had given notice that he intended to bring a law suit which he might never do at all.

The next problem is the attempt and conspiracy sections as they would apply to the antitrust laws.

Talking first about attempts, my concern, and this is a concern of my committee and the antitrust section as well, is that we are about to take away law which has been established on a case by case basis in antitrust cases for nearly 83 years and substitute for it a new body of law which may or may not be the same.

Mr. BLAKEY. I take it any legislative device which allows it to remain as it is would meet your needs?

Mr. CRANE. Correct.

Mr. BLAKEY. For example, if the word "endeavors" were to be substituted in section 2 and it was given the meaning that the word "attempt" had in the old law, this would meet your need and maintain a relationship of congruity with the present title 18?

Mr. CRANE. Yes; I think that would be true, but it should be expressed that the general attempt section does not apply to antitrust offenses or we might have both attempts to monopolize and endeavors to monopolize and they might be different.

Mr. BLAKEY. I take it you would want some legislative history to indicate that the special rules as to intracorporate conspiracy would not be disturbed by the general law of conspiracy?

Mr. CRANE. This is my own view. It is not a specific subject the committee considered.

When we come to conspiracies, we have a similar problem. I believe the way S. 1 is drawn, with a general conspiracy section and a provision in the Sherman Act making it a crime to conspire to restrain trade or monopolize trade, that you could have the crime of a conspiracy to conspire to restrain trade.

Mr. BLAKEY. As long as that was left out and in addition, as long as the general solicitation statute was made inapplicable to antitrust offenses, would that meet your needs?

Mr. CRANE. That would meet my needs as long as the legislative history made it clear that it was not the intention of Congress to change the meaning of conspiracy in the antitrust area.

Mr. BLAKEY. The thought has been that S. 1 codifies the law of conspiracy and this is true also of S. 1400.

Mr. CRANE. Yes.

Mr. BLAKEY. There has been no attempt in either bill to go beyond present law, either to contract it or to broaden it.

Mr. CRANE. The concern of my committee is that that intention be expressly stated in legislative history in regard to antitrust offenses.

If that is done and the general conspiracy statutes are not made to apply to antitrust offenses, I have no problem. The last subject is the subject of remedies, and here we have a series of new remedies which I think pose some problems and have some impact on antitrust offenses.

First, under both S. 1 and S. 1400 you provide for a fine of double the amount of the wrongdoers gross gain or double the amount of the victim's gross loss. In S. 1, you also provide for restitution by the offender. I think these could have some impact on the present treble damage right under the antitrust laws.

Mr. BLAKEY. As long as that treble damage right is left viable, I take it, from the point of view of the administration of the civil aspects, you would have no objection?

Mr. CRANE. I think that I do to this extent: If you have a treble damage right in addition to a double damage fine, you have quintuple damages and it is not something the court in the criminal case can control.

If the court decides to sentence to a double damage fine, another court will be hearing the treble damage action, and at least two courts will have a hand in deciding what the total penalty would be.

Mr. BLAKEY. I suppose that could be met by providing that only actual damages could be obtained where a more than normal criminal fine was imposed?

Mr. CRANE. Yes, it could, but the Supreme Court on many occasions has indicated that the purpose of the treble damage provision is to stimulate enforcement of the antitrust laws and take some of that burden off the Justice Department and the Federal Trade Commission.

I think in doing that, you might be doing violence——

Mr. BLAKEY. After the case has already been prosecuted by the Government, why would you want to stimulate more prosecution on the same set of facts?

Mr. CRANE. When you have the treble damage action following the criminal action, the private treble damage plaintiff is able to use the proof of violation in the Government case so that the treble damage case typically would follow.

It is a way of increasing the penalty which we have had in the antitrust laws for some time.

My own personal view is that that has worked quite well.

I would hate to see anything done myself to interfere with the present treble damage remedy, and I would therefore urge that the double fine not be applicable to antitrust offenses.

In the case of restitution, I think it is important that it not be applied in antitrust offenses because restitution would remove the actual damage to the victim which is the basis to the treble damage action, and I think giving restitution might be held to extinguish the right to sue for treble damages.

Mr. BLAKEY. I take it you would be satisfied if we simply made those provisions inapplicable to antitrust type violations?

Mr. CRANE. Yes.

S. 1 and S. 1400 also provide for the disqualification of an officer of a company or the disqualification of a professional from practicing his profession.

In my prepared statement I have limited my comments to what I believe to be the provision of S. 1, that is, that this disqualification can be permanent, and it strikes me this is——

Mr. BLAKEY. To a degree that is a statutory question. Would you be satisfied if the statutory language was qualified and the period of disqualification was no longer than the period for a sentence of imprisonment?

Mr. CRANE. I think that would be an alternative.

I am not prepared to say that would remove all problems concerning disqualifications in antitrust offenses.

I think in the case of professionals, for example, you have a second problem that is, they are licensed by the State, and you have constitutional problems when the Federal Government seeks to impair that license by a Federal court order.

Mr. BLAKEY. If the court puts him in jail, it certainly disqualifies him from the practice of his profession.

Couldn't the court normally make as an instance of probation that he not practice his profession?

Mr. CRANE. That is a question which I cannot answer, not having looked specifically to that problem.

I am not sure that wouldn't pose similar problems.

Now, perhaps it would be possible for the court to order that he wouldn't do certain things in connection with his profession, but I frankly think it is very broad as drafted.

I have not had time in preparing my testimony to consider what a more limited alternative would be.

Senator IRUSKA. Would it be better if that were left out and each State would apply its law to that particular breach of law, and the conviction and so on?

Mr. CRANE. That would be a happier solution as I sit here at the moment, yes, sir.

I would think that would be a happier solution.

Mr. BLAKEY. If one of the thoughts behind the drafting of the statute was to potentially authorize the district judge to have a greater range of sentencing alternatives and not simply be confined to a fine or imprisonment, would it not be better for a judge to have such an alternative? If he can bring about a disqualification in law rather than prison, from a social point of view might that not be a better objective?

Mr. CRANE. My own view is it could be a better——

Mr. BLAKEY. If it were subject to appellate review, would this relieve you of some of your fear it might be abused?

Mr. CRANE. I am not prepared to comment generally on the subject of appellate review.

I think in connection with some of the other penalties which I would like to discuss, appellate review would be very important. To answer your question, I think appellate review would ameliorate some of my concern that a limited disqualification for corporate officers would be abused.

Another thing of concern to me is the provision that a corporation can be suspended from its right to affect interstate trade or commerce. First of all, I have some problems as to what that might mean. Does it mean that the corporation cannot sell in interstate commerce, and, if so, does it mean that the corporation can sell out of each plant only in the State where it is located or that it can only sell in the State of its incorporation?

Mr. BLAKEY. If the definition of "affect on commerce" is as broad as the Supreme Court has read it, wouldn't it practically mean no business?

Mr. CRANE. That is my conclusion.

I have a number of other examples in my prepared testimony concerning what it could be construed to mean, but I conclude that it is confiscatory.

The antitrust offender is involved in interstate commerce or he wouldn't be subject to the antitrust laws——

Mr. BLAKEY. Are you sure that provision would apply to the antitrust laws?

Mr. CRANE. I see no reason why it would not.

Mr. BLAKEY. It is in title 18 as opposed to the Sherman Act?

Mr. CRANE. As I read both bills, I don't find "offenders" to be limited to title 18, and there are certainly many interplays between title 18 and the —

Mr. BLAKEY. Would your needs be met if it was not applied outside of title 18?

Mr. CRANE. As far as I am concerned, from the antitrust point of view, I believe it would remove 90 percent of my concern.

The other 10 percent would be in the area of document destruction, of false advertising, perhaps a penal regulation violation, which aren't directly antitrust offenses. There would still be some violations in those areas to which disqualification could apply.

Mr. BLAKEY. If it is appropriate to impose the death penalty on a person for certain serious offenses, might it not also be appropriate to impose the death penalty on corporations?

Mr. CRANE. I think there is an analogy when you have closely-held corporations, but as to General Motors, Dupont, Alcoa, the great corporations of the United States, the answer is no. The offense, if there is one, is committed by management, and to terminate the life of the corporation would be to affect many stockholders and employees and the general economy. To "kill" corporations of that size, no.

Mr. BLAKEY. I take it you object to the size only. If it were narrowed to where a corporation were convicted of murder, would you object to having it sentenced to death?

Mr. CRANE. My answer would be, offhand, no. But my testimony is only in relation to competition offenses, and there I feel it should not apply.

Next is the concept of corporate probation, which I have some difficulty with as a concept, as indeed my Committee did and the Section did.

Probation is historically something imposed on people, not corporations.

Mr. BLAKEY. Don't people run corporations?

Mr. CRANE. People run corporations, and I can conceive of the person being put on probation if he is convicted. But to put the corporation on probation presents some difficulties. The principal problem I have with it is that the standards set forth don't apply. For example, a court can't sentence a corporation to support his family.

Mr. BLAKEY. Standards aren't exclusive, are they?

Mr. CRANE. There are two standards which could be applied to corporations: one is that they not consort with people or engage in conduct which might cause them to repeat their offense and secondly, that they comply with such other conditions as the court might wish to impose.

When you think about these conditions, they sound very much like the injunction cases. Injunctions are imposed by courts after hearings, usually after hearings specially held by the judge on the injunctive relief necessary to remedy the violation, and the injunctions are tied to the relief that is necessary, the restrictions that are necessary, to prevent the offense from being recommitted.

Mr. BLAKEY. To the degree there are not civil injunctive remedies in paralleling civil statutes—your objection would only, I take it, apply in those areas where there were—

Mr. CRANE. My objections apply to antitrust offenses and competitive—

Mr. BLAKEY. I take it, your objection to corporate probation really only runs to those areas where there are parallel injunctive remedies.

There are not parallel injunctive remedies to all crimes.

Mr. CRANE. I agree with that. None of my remarks should be taken as going beyond the field in which I have considered the provision.

Mr. BLAKEY. Your need would really be met with an exclusion for offenses where there are parallel injunctive remedies?

Mr. CRANE. My need would be met but I would hate to phrase it that way, because I might get a lot of litigation over where there are parallel injunctive remedies.

My belief is that, in the area of competition offenses and particularly antitrust offenses, there are parallel injunctive remedies, but I wouldn't want to get into a lot of litigation over what a parallel injunctive remedy was.

Mr. BLAKEY. It would have to be defined by referring to certain statutes?

Mr. CRANE. Yes, and that would meet my objection if the antitrust laws were included among the statutes having parallel injunctive remedies that probation would not apply. Probation imposed in the very last days of a criminal trial would give few bases for the framing of a proper injunctive type provision.

Finally, both bills provide for giving notice to the victims of crime. This is one situation where my committee is strongly in favor of the additional remedy.

I would, however, point out a difference between the language of S. 1 and the language of S. 1400.

S. 1 requires the notice to be given only to the people affected by the conviction; whereas, S. 1400 adds those interested in the offense.

Mr. BLAKEY. There is a difference between notice as a sanction and notice as a technique for bringing about restitution, and the difference is largely between S. 1 and S. 1400.

Mr. CRANE. I agree with that.

I think the committee felt both aspects of it were important.

Mr. BLAKEY. So I take it, you are testifying now in support of the broader provisions of S. 1400 and perhaps the minority view of the Brown Commission, and not in favor of S. 1 and the majority of the Brown document?

Mr. CRANE. I am personally. The distinction was not one to which the committee addressed itself.

Mr. BLAKEY. Are you aware of the views of the Business Law Section of the American Bar Association made known to this subcommittee?

I understand they had some serious doubts about the sanction as opposed to notice as a technique of invoking restitution?

Mr. CRANE. I am. I am also aware the criminal law section has taken positions which are not all consistent which the positions the antitrust section took. In different areas of the law different problems may be presented.

I am sure, Mr. Blakey, that, given more time, I might comment on other provisions, and I think other antitrust lawyers might comment

on still additional provisions. Two that immediately come to mind are the false advertising provisions and the regulatory offense provisions of section 2-8F6 of S. 1. I did not comment on either of these in my written testimony. I did not comment on the regulatory offenses, because as I read the bill, there is no intention to amend the antitrust statutes, so that they would carry criminal penalties for regulatory offenses.

I did not comment on the false advertising question, although some of my colleagues believe this would work substantial hardships, particularly in the area where you offer a "special" and you can be criminally liable if you don't have enough for everybody that comes in and don't know the approximate quantity which will be available. There was the statement from some of my colleagues that it would be very difficult in practice to determine, for example, exactly how many cases of eggs would be on the shelf at sale price.

I mention that because, as drawn, S. 1 and S. 1400 would be the most comprehensive revision of the antitrust laws since the Clayton Act became law. I would hate to see it done without more people familiar with the antitrust field expressing their views on the bills.

Mr. BLAKEY. I take it, as to the unfair commercial practices provision, that the thrust of your statement is that you would rather see that factored out as a separate statute and processed independently of S. 1?

Mr. CRANE. I would.

I would also rather see the changes in antitrust laws which are in S. 1 and S. 1400, if the changes are to be made in the way the bills now provide, I would rather see that done in a special statute, too.

Mr. BLAKEY. If changes were made along the lines suggested by the previous questions, I take it you wouldn't feel that way?

Mr. CRANE. That is correct. That has to be a personal view.

Senator HRUSKA. Thank you very much, Mr. Crane. You have given us a good analysis.

In all fairness, I must say I don't agree with all your conclusions or recommendations and I am sure you didn't expect us to. I am sure some of the other members of the committee would feel likewise.

As to S. 1 and S. 1400, would you finalize that when you get action by your section?

Mr. CRANE. I will, Senator.

I am not sure how long that will take. It is a long process. I think the report we sent to you on the Brown Commission recommendations took roughly 2 years to prepare and get through channels. But I will certainly pursue that and send you the information.

Senator HRUSKA. In the meantime, if the staff or members of the committee have further questions, we would like to correspond with you by letter and get further collaboration on one or another of these points.

Thank you for coming.

Mr. BLAKEY. I would like to particularly express my appreciation on behalf of the staff. This testimony is very detailed and very technical, and is extremely helpful to us. It is a yeoman's public service from a very busy lawyer like you who must work in the night to produce some of the things that are shown here.

Senator HRUSKA. Mr. Chumbris, Minority Counsel to the Antitrust and Monopoly Subcommittee, has been in the room. He has gone over your statement. He has expressed thoughts similar to those of Mr. Blakey.

Mr. CRANE. You are extremely kind. We welcomed the opportunity to be able to discuss the bills with you.

[Full text follows:]

TESTIMONY OF MARK CRANE, MEMBER OF THE COMMITTEE ON CRIMINAL PRACTICE AND PROCEDURE OF THE ANTITRUST SECTION OF THE AMERICAN BAR ASSOCIATION

Antitrust offenses can be criminal offenses, but they form only a small part of the law reform which you are considering. The question which I will discuss is simply: What is the impact on antitrust enforcement of the proposed changes in the criminal laws. By focusing on this one aspect of the two bills under consideration—S.1 and S.1400—I hope that I can help uncover some problems that may have gone unnoticed in the course of pursuing the much broader task in which you are engaged.

I am here today because I am a member of the Committee on Criminal Practice and Procedure of the Antitrust Section of the American Bar Association. This Committee has prepared a written report on the recommendations of the National Commission on Reform of Federal Criminal Laws (the Brown Commission), which was submitted to the Staff of this Subcommittee last November. This Report represents the views of the Antitrust Section, and I request that it be made part of the record of these hearings.

S.1 and S.1400 grew out of the Brown Commission Report, but differ in substantial respects from it. In fact, many of the most important problems presented by the bills for antitrust enforcement were not involved in the Brown Commission's recommendations. Thus, I will be talking in large measure about subjects which were not covered at all in my Committee's Report.

Because of time limitations, I have not been able to clear my remarks with the Council of the Antitrust Section, and they must, therefore, be considered as my personal views and not necessarily those of the Antitrust Section or the American Bar Association except to the extent that I specifically indicate otherwise.

CHANGES FOR CRIMINAL LIABILITY

Let me turn first to the effects of the conforming amendments to the antitrust laws which appear in Section 316 of S.1 on pages 325-6 of the bill. These changes, while simple in form, would have extensive—and perhaps unintended—consequences for antitrust enforcement.

Deletion of Attempts to Monopolize from Section 2

First, Section 316(a)2 amends Section 2 of the Sherman Act to strike out the words "or attempt to monopolize". The purpose of this deletion is apparently to make it clear that an attempt to monopolize falls within the general section on criminal attempts—Section 1-8A4. Such an intention was indicated by Senator McClellan's observation that "the general provision on attempt is applicable to every federal crime except as specifically excluded in the section on a specific offense" and will "eliminate the need for special attempt statutes". (Congressional Record, Volume 119, No. 6, January 12, 1973, at page S-569.)

Putting aside for the moment the substantial changes that Section 1-2A4 would make in the substantive law of attempts to monopolize, a collateral effect of deleting attempts to monopolize from Section 2 of the Sherman Act would be to deny private parties the right to obtain treble damages for injuries resulting from such attempts.

Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws, may sue *** and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (15 U.S.C. § 15) The key words are "anything forbidden in the antitrust laws" since the Supreme Court has held that no right to recover treble damages can result from allegedly anticompetitive conduct which is not proscribed by the antitrust

Laws, Nashville Milk Co. v. Carnation Co., 355 U.S. 373 (1958), holding that a violation of Section 3 of the Robinson-Patman Act could not be redressed by treble damages because it was not part of the antitrust laws.

The "antitrust laws", as used in Section 4 of the Clayton Act, are defined in Section 1 of that Act, 15 U.S.C. §12, to include Section 2 of the Sherman Act. They do not, obviously, include the general attempts section of S.1, nor should Section 1 of the Clayton Act be amended to include in the definition of the antitrust laws a general attempts section in the new Criminal Code which deals principally with criminal activity having nothing to do with antitrust offenses.

Thus, the effect of deleting attempts to monopolize from Section 2 of the Sherman Act would be to eliminate the right of private parties to sue for treble damages—a right which the Supreme Court has said is "not merely to provide private relief, but . . . to serve as well the high purpose of enforcing the antitrust laws". *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. 100, 130-1 (1969). I would oppose such a change.

Imposing Criminal Liability for Violation of the Clayton and Robinson-Patman Acts

Another substantial, and perhaps inadvertent, change in the antitrust laws is made in the Robinson-Patman and Clayton Acts by Sections 316(c) and 316(d), respectively, of the conforming amendments in S.1.

Taking the Robinson-Patman Act first, Section 316(c) amends the last paragraph of Section 3 of the Robinson-Patman Act. That paragraph now provides a fine or imprisonment for "any person violating any of the provisions of this section". (15 U.S.C. §13a; emphasis supplied.) The language in the conforming amendments to S.1 would replace the quoted phrase with one providing criminal penalties for "any person violating any of the provisions of this Act". (Emphasis supplied.) Thus, while at the present time criminal penalties attach only to the violation of one section of the Robinson-Patman Act, the amendment would appear to make any violation of the entire act a criminal offense, including any violation of Section 2. (15 U.S.C. §13) This would mean that any price discrimination offense would carry with it criminal penalties, sweeping away the present distinction between those offenses in Section 2 where a price discrimination occurs without an express intent to injure a competitor and those offenses in Section 3 where the price discrimination results from specific knowledge that a competitor cannot respond with equal concessions or "for the purpose of destroying competition or eliminating a competitor". (15 U.S.C. §13a)

Similarly, Section 316(d) of the conforming amendments to S.1 would amend the fourth paragraph of Section 10 of the Clayton Act. (15 U.S.C. §20) At the present time, the paragraph being amended provides criminal penalties for any common carrier, or director, agent, manager or officer of a common carrier, who "shall violate this section". (Emphasis supplied.) The proposed amendment provides for criminal penalties against "any person who violates this Act". (Emphasis supplied.) Thus, while at the present time there are provided criminal penalties for common carriers, and their agents who violate Section 10 of the Clayton Act, the proposed amendment would make the entire Clayton Act a criminal statute. Such an amendment would, for the first time, impose criminal penalties upon corporations—and on their responsible officers and directors—who engage in mergers found to violate Section 7 (15 U.S.C. §18); who enter into exclusive dealing contracts found to violate Section 3 (15 U.S.C. §14); or who serve as directors of two or more corporations which are found to be competitors in violation of Section 8 (U.S.C. §19).

The inappropriateness of criminal sanctions for mergers, exclusive dealing contracts, interlocking directorates and price discrimination is apparent from the standard of illegality used in the sections creating those offenses—a standard phrased in terms of future probability.

Section 2 of the Robinson-Patman Act (price discrimination), Section 3 of the Clayton Act (exclusive dealing contracts), and Section 7 of the Clayton Act (mergers) each condemns the conduct it makes illegal only if the effect of such conduct "may be substantially to lessen competition or tend to create a monopoly" in any line of commerce. Section 8 of the Clayton Act condemns a director who sits on the boards of two or more corporations who are competitors "so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws",

including agreements violating Section 3 and Section 7 with their future standards of liability. When the task is to determine what a result "may be" or whether conduct "tends" to create a prohibited condition, reasonable men may differ, and criminal penalties are singularly inappropriate.

An example familiar to Congress shows the problems involved in imposing criminal sanction for an action which is illegal only if it "may" substantially lessen competition or "tend" to create a monopoly. The Bank Merger Act of 1966 provided that any bank merger consummated before June 17, 1963 "shall be conclusively presumed not to violate" Section 7 of the Clayton Act. (Pub. Law 89-356, 80 Stat. 7, Feb. 21, 1966, §2(a)) At least one of the mergers blessed by the Bank Merger Act had previously been held to be illegal by a District Court. *United States v. Manufacturers Hanover Trust Company*, 240 F. Supp. 867 (S.D. N.Y. 1965). If the conforming amendments to S.1 had been law in the 1960's, the corporations involved in those mergers, and their responsible officers and directors, would have been liable to criminal prosecution for conduct which Congress later approved—and might well have been convicted before Congress could act.

A further complication in making anticompetitive mergers (and other similar conduct) criminal offenses is that a merger, legal when it was consummated, may become illegal by reason of subsequent changes in the market. In *United States v. duPont (General Motors)*, 353 U.S. 586 (1957), the Supreme Court permitted the Department of Justice in 1949 to attack duPont's pre-1920 acquisition of a 23% stock interest in General Motors because "at the time of suit, there [was] a reasonable probability that the acquisition [was] likely to result in the condemned restraints". (353 U.S. at 607; emphasis supplied.) Whether there was a similar probability when the merger occurred is immaterial because "the Government may proceed at any time that an acquisition may be said with reasonable probability to contain a threat that it may lead to a restraint of commerce or tend to create a monopoly of a line of commerce." (353 U.S. at 597)

Such a result is possible because no intent to lessen competition or create a monopoly is required for a Section 7 violation. In *duPont*, the Court stressed that:

"the fact that all concerned in high executive posts in both companies acted honorably and fairly, each in the honest conviction that his actions were in the best interests of his own company and without any design to overreach anyone, including duPont's competitors, does not defeat the Government's right to relief. It is not requisite to the proof of a violation of § 7 to show that restraint or monopoly was intended." (353 U.S. at 607)

Thus, one corporation may merge with another under market conditions which make the merger seem lawful. These conditions can then change and the government can charge that the merger violated Section 7 on the theory that, under the changed market conditions, it "may" (perhaps for the first time) substantially lessen competition or "tend" to create a monopoly. In *duPont*, this resulted only in civil remedies. If S.1 becomes law, it could result in criminal prosecutions for the corporations and their officers and directors.

Indeed, standards of liability phrased in terms of "may" or "tend" make it so difficult for the prospective offender to determine where lies the line between the criminal and the permissible as to raise a question whether they are constitutionally vague when they become criminal offenses. *United States v. Harris*, 347 U.S. 612, 617 (1954) (a statute must be sufficiently definite "to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute".)

Elevating Antitrust Violations to the Status of Felonies

The conforming amendments to S.1 make violations of Sections 1, 2 and 3 of the Sherman Act and all provisions of the Robinson-Patman and Clayton Acts felonies. Present law provides criminal penalties for Sections 1, 2 and 3 of the Sherman Act, but each section specifically provides that conviction shall be conviction of a misdemeanor. (15 U.S.C. §§1, 2, 3). As already noted, most sections of the Clayton and Robinson-Patman Acts do not now include criminal penalties, and those sections which do—Section 3 of the Robinson-Patman Act (15 U.S.C. 13a) and Section 10 of the Clayton Act (15 U.S.C. §20)—do not provide that violations are felonies.

The change in antitrust offenses from misdemeanors to felonies has many collateral consequences. Indictment procedures must be used instead of permit-

ting a case to proceed on information as the Justice Department sometimes does in antitrust cases when the indictment returned proves unsatisfactory for some reason. Of even greater importance are the collateral consequences which occur to the convicted felon—most of which result from State law. See law. See *"The Collateral Consequences of a Criminal Conviction,"* 23 Vand. L. Rev. 929 (1970)

In the overwhelming majority of States a convicted felon loses his right to vote, and in many States he cannot hold public office. (23 Vand. L. Rev. at 975-7, 991-4) If a member of a licensed occupation, his State-granted license can be revoked. (23 Vand. L. Rev. at 1010-1) Certainly, employers will look differently upon a convicted felon than upon other prospective employees, and civil rights laws do not prevent discrimination against felons in hiring. (23 Vand. L. Rev. at 1001-2) Life insurance companies may be reluctant to insure convicted felons at normal rates, and automobile insurance may not be available to them. (23 Vand. L. Rev. at 1110-1, 1121-4) Many State pension plans require a felon to forfeit his pension rights and corporate plans may involve pension forfeiture by a convicted felon either directly or because of his inability to continue working for the employer. (23 Vand. L. Rev. at 1125-32)

A felony conviction prevents the man from acting as an executor, administrator or guardian in many States, even after his release, (23 Vand. L. Rev. at 1060-3), and in other States conviction of a felony is grounds for divorce, regardless of the sentence imposed. (23 Vand. L. Rev. 1067-9) In addition to these problems, thirteen States—including New York, Missouri and California—declare felons to be "civilly dead" while they are in prison. Although this status ends upon their release and the consequences of being "civilly dead" vary from State to State, it has been held that a "civilly dead" felon cannot contract and that his marriage can be dissolved—with consequences which may not be easily reversible upon release. (23 Vand. L. Rev. at 950-951, 1031-3, 1065)

None of these consequences follow today from an antitrust conviction, and I do not mean to imply that they would all flow from each conviction under the antitrust laws even if antitrust offenses become felonies. But they could, and some of them undoubtedly would. As Chief Justice Warren, dissenting in *Parker v. Ellis*, 362 U.S. 574, 593-4 (1960), said:

"Conviction of a felony imposes a *status* upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities." (Emphasis in original.)

Without arguing at the moment whether the more serious ramifications of a felony conviction are appropriate for antitrust offenders—and heavier fines for Sherman Act violations would be imposed by S.782, presently being considered by the Senate Subcommittee on Antitrust and Monopoly—it would appear that the collateral consequences of making antitrust offenses felonies were not intended by the draftsmen of S.1. The conforming amendments to S.1 make all antitrust violations Class E felonies, for which the prison term may not exceed one year. This is the same prison term which is presently provided in Sections 1, 2, and 3 of the Sherman Act, Section 3 of the Robinson-Patman Act, and Section 10 of the Clayton Act. S.1 also leaves the fines to be imposed for antitrust offenses at the same levels as at the present time. (Compare §316(a), (c) and (d) in S.1 with 15 U.S.C. §§1, 2, 13a and 20)

S.1400, the Administration's bill, would make no change in the penalties imposed for, or the misdemeanor classification of, antitrust offenses. If a crime outside of Title 18 is classified (e.g. Sherman §1), the classification remains; if it is unclassified but carries a penalty of more than six months (e.g. Robinson-Patman §2), it is a Class A misdemeanor. (S.1400, §2002). Thus, it would appear that S.1 will subject antitrust violators to substantially harsher consequences than either the present law or S.1400, both of which make antitrust offenses misdemeanors. Since S.1 does not have greater stated penalties for antitrust offenses, it should not impose more severe punishment indirectly by denominating those offenses felonies.

Destruction of Corporate Records

The conforming amendments in S.1 amend the Federal Trade Commission Act by Section 316(e)(3) (at page 326) to incorporate the provisions of Sections 2-6D3, a section which makes it a felony to make a false entry in or to

destroy a government record. Section 2-6D3 includes within a definition of government record a "record, document or thing required to be kept under a statute which, in fact, expressly invokes the sanctions of this section". Apparently the amendment to the second paragraph of Section 10 of the Federal Trade Commission Act (15 U.S.C. 50) is intended to expressly invoke the sanctions of Section 2-6D3.

At the present time, the second paragraph of Section 10, among other things, makes it a crime to "willfully make or cause to be made any false entry in any account, record or memorandum kept by any corporation" subject to that Act, or to "remove out of the jurisdiction of the United States * * * or willfully refuse to submit to the commission * * * any documentary evidence". (15 U.S.C. §50)

By its terms, this language could be construed to require every corporation subject to Federal Trade Commission jurisdiction to retain all its records indefinitely. See Beckstrom, "Destruction of Documents with Federal Antitrust Significance", 61 NW.U.L.Rev. 687 (1966) at 694-5. However, in the only case which I have found that considered the point, the scope of this language was limited to "false entries in records *required* to be kept by the Act or by order of the Commission", even though no such limitation is apparent on the face of Section 10 itself. *United States v. Cannon*, 117 F.Supp. 294 (N.D. Ill. 1953: Emphasis Supplied.)

This is a reasonable limitation; without it, criminal sanctions would apply to any erroneous entry in, and every disposition of, any document kept by any corporation subject to FTC jurisdiction, which includes "any corporation engaged in commerce, excepting banks and common carriers". (15 U.S.C. §46, FTC Act §6) Such a sweeping criminal provision would be distinguished chiefly by its unenforceability, and would probably be construed more narrowly than its literal language to avoid any constitutional question concerning it. See Beckstrom, "Destruction of Documents with Federal Antitrust Significance", 61 NW.U.L.Rev. 687 (1966) at 695.

It would seem that the legitimate law enforcement needs would be met if Section 10 of the Federal Trade Commission Act were amended to conform to the present construction of its language by the courts. This could be accomplished if the proposed conforming amendment—§316(e) (3)—were amended to read:

"Any account, record or memorandum required to be kept by the Act or by order of the commission is subject to the provisions of Section 2-6D3 of Title 18, United States Code".

The Administration's bill—S.1400—tackles a similar problem in a different way. Section 1325 makes it a felony to alter or destroy a document "with intent to impair its integrity or availability in an official proceeding", even though no such proceeding is "pending or about to be instituted" when the document is altered or destroyed. S.1400 defines, in Section 111, an official proceeding as being a proceeding before "any government agency or any public servant who is authorized to take oaths", including notaries public. Thus, the effect of S.1400 is to make it a felony to dispose of documents if the person or corporation destroying them has, among other purposes, the thought that the documents will be unavailable in any litigation, civil or criminal, that may be instituted at a future time.

One of the principal problems which corporations have today is record retention. The advent of copiers and computers has vastly increased the volume of records which have to be stored, and the cost of retaining them indefinitely has prompted most corporations to adopt regular document retention and disposal programs.

Section 1325 of S.1400 would seriously impede such programs or perhaps stop them entirely. In antitrust cases extensive market analyses are necessary and the defendant's way of doing business is at issue. Tens of thousands of documents are produced in individual cases, and when the question is what corporate documents might be relevant to *any* antitrust case that might be brought in the future—either against the corporation having the documents or against one of its competitors—nearly every piece of paper in the files would present the possibility of being relevant itself or being a lead to admissible evidence. In either case, it could not be destroyed.

If corporate officials took the risk of destroying documents anyway—even though no antitrust case was then "pending or about to be instituted"—they

would be guilty under Section 1325, unless the jury concluded that they had no "intent to impair the documents *** availability in an official proceeding", including its availability at a deposition before a notary public. No matter how honorable their intentions, they might have considerable difficulty convincing a jury of their purity of mind if the destroyed documents assume crucial importance in later litigation. In those circumstances, it would be easy for the jury to conclude that they intended the reasonable consequences of their acts—that having intended to destroy the documents, they also intended to make them unavailable in litigation.

Section 1325 of S.1400 goes far beyond present law when it makes document destruction a crime even though no proceeding is "pending or about to be instituted" at the time the document is destroyed. Present authority requires that, for document destruction to be a criminal offense, the defendant must know "that there was some inquiry in which these papers might be required or that the grand jury had requested them, or perhaps both". *United States v. Siegel*, 152 F. Supp. 370, 376 (S.D. N.Y. 1957); cf. *United States v. Solow*, 138 F. Supp. 812 (S.D. N.Y. 1956).

It would seem that the legitimate interests of society in preventing the document destruction from impeding antitrust enforcement would be served if Section 1325 of S.1400 were amended to limit its scope to documents altered or destroyed with intent to impair their availability in proceedings which were either pending or about to be instituted when the documents were destroyed. Such a rule, which still goes substantially further than present law, would permit corporations to engage in record retention and disposal programs at other times without fear of criminal consequences.

Criminal Attempts, Conspiracies and Solicitation

Both S.1 and S.1400 contain general sections dealing with criminal attempts (§1-2A4 in S.1; §1001 in S.1400), and these sections apply to antitrust offenses. (§1004(b) in S.1400; Remarks of Senator McClellan, Congressional Record, Vol. 119, No. 6, January 12, 1973, at page S-569).

We have already discussed the consequences of removing an attempt to monopolize from the Sherman Act. However, in addition to that problem, the standards set forth in both S.1 and S.1400—an intent to commit a crime plus conduct which corroborates this intent—would place in doubt the relevance of existing law which has been developed in antitrust litigation on a case-by-case basis over nearly a century.

At the present time, in order to be convicted of an attempt to monopolize, it must be shown that there is a dangerous probability that the defendants will succeed in obtaining monopoly power. *American Tobacco Corp. v. United States*, 328 U.S. 781, 785 (1946); *Cliff Food Stores v. Kroger Company*, 417 F.2d 203, 207 (5 Cir. 1969); *Highland Dairy Inc. v. Kroger Company*, 402 F.2d 968, 971 (8 Cir. 1968) Before courts conclude that there is a dangerous probability that an attempt to monopolize will succeed, the plaintiff has generally been required to show that the defendant had a significant share of the market in which the attempt to monopolize occurred. *Walker Process Equipment Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965); *Bernard Food Industries, Inc. v. Dietene Co.*, 415 F.2d 1279, 1284 (7 Cir. 1969) cert. denied, 397 U.S. 912 (1970); *Highland Dairy Inc. v. Kroger Company*, 402 F.2d 968, 974 (8 Cir. 1968); contra *Industrial Building Materials Inc. v. Inter-chemical Corp.*, 437 F.2d 1336, 1344 (9 Cir. 1970); *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474-5 (9 Cir. 1964), cert. denied, 377 U.S. 993 (1964). This requirement flows naturally from the fact that the crime being attempted—monopolization—can only occur in the context of a specific market. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *United States v. DuPont (Cellophane)*, 351 U.S. 377 (1956).

A dangerous probability of success might or might not be construed by future antitrust courts to be the same thing as the "conduct which, in fact, corroborates his intent" required by Section 1001 in S.1400 and the "conduct constituting, in fact, a substantial step toward commission" of a crime required by Section 1-2A4 in S.1. There is certainly a real—perhaps even dangerous—probability that these new words will be construed to mean something different from the dangerous probability of success in a specific market which is required today for an attempt to monopolize conviction.

The risk that a general attempts section would not incorporate this requirement when applied to attempts to monopolize is underscored by an examination of the examples given in Section 1-2A4 of S.1 for conduct which would

constitute a "substantial step toward commission" of a crime. These examples include lying in wait for the victim; reconnoitering the place where the crime is to be committed; enticing the victim to the place where the crime is to be committed; entering a structure where the crime is to be committed; and possessing or collecting material to be used in connection with the crime.

These standards fit nicely with attempts to commit many common law crimes, such as rape, murder or robbery. They are wholly inapplicable to an attempt to monopolize. One can envision the prosecution offering evidence, in an effort to comply with these examples, that the incipient monopolist took substantial steps toward completion of its crime by lying in wait for its unfortunate competitor at the Metropolitan Club, by skulking about its headquarters office (the "structure" where the crime was to be committed) or reconnoitering the market through the use of market surveys and public opinion polls.

It simply seems inappropriate to wipe away the standards which judges have developed over 83 years for determining when an attempt to monopolize exists and substitute for them general standards designed with common law crimes in mind—a position which my committee and the antitrust section took in a report which has been placed in the record of these hearings.

Similarly, the effort to apply general criminal conspiracy to statutes to conspiracies to restrain or monopolize trade could wipe out the existing law which has been developed with those particular offenses in mind. Both S.1 and S.1400 make it a crime "to agree with one or more persons *** to engage in or cause the performance of conduct" constituting a crime and then take action to "effect an object" of the agreement. (§1-2A5 in S.1; §1002 in S.1400).

This definition of conspiracy would apply both to conspiracies to restrain trade in violation of Section 1 of the Sherman Act and to conspiracies to monopolize trade in violation of Section 2 of the Sherman Act. Under S.1400, the term "conspiracy" when used in those sections "means *** criminal conspiracy as described in [Section 1002]" (§1004(b)). While there is no equivalent provision in S.1, Senator McClellan mentioned specifically in his remarks when he introduced S.1 that the general conspiracy section—Section 1-2A5—would apply in the antitrust field. (Congressional Record, Vol. 119, No. 6, January 13, 1973, at page S-569).

The law of conspiracy under the Sherman Act has developed in numerous cases over many years and taken particular note of special problems in antitrust conspiracies. My committee and the antitrust section concluded in our report that this law should not be scrapped. An example, not included in the report, may illustrate the nature of my concern in this area.

One of the most troublesome questions has been where to draw the line between legal and conspiratorial conduct when the alleged conspirators are connected with the same business enterprise. Under present law:

1. Parent corporations and their subsidiaries conspire in violation of the Sherman Act if they are held out as competitors, *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951), or if they act in concert to coerce or restrain third parties, *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141-2 (1969); *United States v. General Motors Acceptance Corp.*, 121 F.2d 376 (7 Cir. 1941), cert. denied, 314 U.S. 618 (1941), but not if they only act collectively to decide how they conduct their own affairs, *Beckman v. Walter Kidde & Co., Inc.*, 316 F. Supp. 1321, 1326 (EDNY 1970), *aff'd per curiam* 451 F.2d 593 (2 Cir. 1971); Report of the Attorney General's Committee to Study the Antitrust Laws (1955) at 34; Letter from Assistant Attorney General Richard W. McLaren to Thomas J. O'Connell, General Counsel of the Board of Governors of the Federal Reserve System, February 22, 1971 (CCH Trade Reg. Rep. ¶ 50,122).

2. Joint activities between a company and its unincorporated division do not, however, constitute a conspiracy, *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke and Liquors, Ltd.*, 416 F.2d 71 (9 Cir. 1969), cert. denied, 396 U.S. 1962 (1970); *Cliff Food Stores Inc. v. Kroger Co.*, 417 F.2d 203 (5 Cir. 1969).

3. Officers and employees of a single business enterprise can act jointly without engaging in a conspiracy in violation of the Sherman Act, *Nelson Radio & Supply Co. v. Motorola Inc.*, 200 F.2d 911, 914 (5 Cir. 1952); see *Chapman v. Rudd Paint & Varnish Co.*, 409 F.2d 635, 643 n.9 (9 Cir. 1969).

This law, so laboriously developed, may be inconsistent with the proposed general conspiracy statutes. Both S.1 and S.1400 define "person" as including both human beings and organizations (§1-1A4 (52) in S.1; §111 in S.1400).

There would appear to be nothing in either bill which would prevent the two persons who conspire from being, for example, a manufacturing corporation and its wholly-owned sales subsidiary who are discussing nothing more than the prices at which the sales subsidiary will sell the products manufactured by the parent. This problem could be avoided if the legislative history makes it clear that the intention of Congress is to retain, in connection with antitrust offenses, the present law governing antitrust conspiracies.

There is an additional problem with Section 1-2A5, the conspiracy provision in S.1. That provision is superimposed on the present conspiracy provisions in the Sherman Act, which make it a crime to conspire to restrain or monopolize trade. Since Section 1-2A5 of S.1 makes it a crime to conspire to commit any other crime, apparently it will be a felony under S.1 to conspire to commit the crime of conspiring to restrain or monopolize trade.

Thus, if two competitors get together to try to organize a price-fixing conspiracy among their fellow competitors, are rebuffed and give up the attempted conspiracy, it would appear that they would be guilty, under Section 1-2A5, of conspiring between themselves to organize a conspiracy to restrain trade in violation of Section 1 of the Sherman Act. A similar problem would not appear to exist in S.1400 because it simply amends the definition of conspiracy in the Sherman Act to "mean *** criminal conspiracy as described in [Section 1002]". (§1004(b))

It is doubtful that the two competitors described a moment ago did anything close enough to restraining trade that the law should take notice of their conduct. Perhaps it was not the intention of the draftsmen of S.1 to reach this result since a conspiracy to organize a conspiracy to restrain trade sounds very much like an attempted conspiracy, and Section 1-2A5 specifically provides that criminal attempt "is inapplicable under this section".

On the other hand, it may have been intended to attach criminal significance to organizing an aborted conspiracy because Section 1-2A3 of S.1 makes it a crime if a person intentionally "requests, commands, induces or otherwise endeavors to persuade another person to engage in conduct constituting, in fact, a crime". Although this Section specifically excepts criminal attempts from its application, it contains no similar exceptions for criminal conspiracies. S.1400, on the other hand, specifically limits its equivalent provision—Section 1003—to certain specified crimes, such as treason, murder and trafficking in hard drugs.

Whatever the merits may be of punishing solicitation to commit treason, murder, or drug pushing, it is both unnecessary and unwise to make it a crime to solicit someone to violate the antitrust laws, when the solicitation results in neither an attempt nor a conspiracy. In antitrust cases, courts agonize at length over whether business conduct constitutes an antitrust offense. The length of antitrust trials and volume of antitrust records is too well known to need documentation, and it is not uncommon for important antitrust opinions to review and analyze the facts for 100 pages.

If problems of this complexity are presented by completed transactions they become even more difficult when a transaction is inchoate. In the case of both attempts and conspiracies, some concrete action is required which may give the court some ideas whether the contemplated business conduct, if completed, would restrain trade. Criminal solicitation leaves out the requirement of action, thereby moving the restraint into the realm of conjecture.

When one man asks another to kill a third man, there is little speculation involved in deciding that, if the offer were accepted, a crime would result. But if one man asks another to accept an exclusive distributorship in Illinois for a new product on the condition that either party can cancel it on six months' notice, it is far from clear that a Sherman Act violation would occur even if the offer were accepted. At the very least, the detailed provisions of the never-prepared contract, the size of the parties, the nature of competition in Illinois, the qualified Illinois distributors available to other manufacturers and the sources of supply open to other Illinois distributors are relevant and unknown. When it is unclear that the final arrangement would be illegal, and it was never entered into anyway, what purpose is served by having busy courts spend time trying to decide whether the proposal would have been illegal if it had been implemented.

Even in the area of *per se* offenses—such as price fixing and group boycotts—it can be difficult to tell whether the conduct involved constitutes a pro-

scribed activity. For example, courts have struggled mightily—and inconclusively—over whether consciously parallel conduct evidences an agreement to fix prices or boycott distributors. Compare *Interstate Circuit Inc. v. United States*, 306 U.S. 208 (1939) and *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948) with *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954) and *United States v. National Maleable and Steel Castings Co.*, 1957 Trade Cas. ¶68,890 (N.D. Ohio 1957), *aff'd per curiam*, 358 U.S. 38 (1959). What point is there in expending this type of judicial effort in situations where the proposed price fixing scheme or group boycott never got further than one competitor asking another and getting rebuffed? If the proposal gets into the action stage, it falls within the definition of attempts or conspiracies and can be dealt with under those sections.

A related problem presented by S.1 arises from the interplay between the criminal attempt and conspiracy sections (§§1-2A4 and 1-2A5) on the one hand and, on the other hand, the amendment of the Robinson-Patman and Clayton Acts to make any violation of those statutes a felony (§316(c) and §316(d)). The way the bill is now drafted every salesman who solicits an order at a price containing a discriminatory discount is guilty of a criminal attempt, and if the order is accepted, buyer and seller are guilty of a criminal conspiracy. And every executive who unsuccessfully proposes a merger which a court might later decide "may * * * substantially lessen competition or tend to create a monopoly" is guilty of a criminal attempt if he took any substantial action in preparation for the meeting and, if an executive of the other corporation works with him in exploring the possibility before calling it off, they are both guilty of criminal conspiracy. Surely such results are unwise and unintended, and they can be easily remedied by modifications to the conforming amendments.

Changes in the conforming amendments would not, however, solve the basic problem. Attempts to conspire, conspiracies to conspire, solicitations to conspire are all too hypothetical to concern the courts—at least when they involve complex antitrust offenses. The judiciary has more important work to do than trying to unravel the legal and economic consequences of business arrangements that never came close enough to fruition to constitute at least an attempt or conspiracy under present antitrust standards.

CHANGES IN CRIMINAL PENALTIES

Fines, Restitution and Treble Damages

Both S.1 and S.1400 would permit the trial court to impose a fine on a corporation or individual convicted of an antitrust offense in an amount "which does not exceed twice the gross gain derived or twice the gross loss caused [by the offense], whichever is greater". (S.1, §1-4C1(b) ; S.1400, §2201(c) ; the quotation is from the language of S.1400 but the concept in S.1 is identical) In addition, S.1 provides that an antitrust offender may be required by the court "to make restitution to the person injured by the commission of the offense" (S.1, §1-4A1(c)(5)). Putting aside for a moment the desirability of stiffer fines for antitrust offenders, these provisions have a substantial impact on the existing treble damage remedy for antitrust offenses.

As we have already noted, Section 4 of the Clayton Act permits a person injured "in his business or property" by anything forbidden in the antitrust laws to recover "threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee". (15 U.S.C. §15) The Supreme Court has approved treble damage actions, describing them as "one of the surest weapons for effective enforcement of the antitrust laws". *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965).

Under both S.1 and S.1400 fines equal to twice the amount of the defendant's improper gain or the victim's improper loss appear to be in addition to the treble damage right conferred by Section 4 of the Clayton Act. There is nothing to indicate that the fine imposed by the new Criminal Code—which goes to the government—would in any way impair the right of the injured victims to sue for treble damages under Section 4 of the Clayton Act. Thus, the provisions in S.1 and S.1400 providing for such fines could increase the liability of an antitrust offender from treble damages to quintuple damages.

The restitution provisions of Section 1-4A1 of S.1 have an even more troublesome impact on the victims' right to receive treble damages. It is possible that restitution will be in addition to both treble damages and a fine of twice

the defendant's gross gain from his anti-trust offense—in which case the anti-trust violator would be subjected to sixfold damages. However, it would seem more likely that restitution, if ordered would extinguish the victims' treble damage rights.

Restitution, unlike a fine, would go to the victim. It would normally be ordered in the criminal case before the treble damage award is obtained because a criminal conviction is *prima facie* evidence in a treble damage action for the same offense and the statute of limitations on private actions is suspended during the pendency of the criminal case and for one year thereafter. (15 U.S.C. §16) If the restitution is made first, the victim would be fully compensated for the injury to his business or property and there would not appear to be the damages required for the victim to maintain a subsequent treble damage action. See *Story Parchment Company v. Paterson Parchment Paper Company*, 282 U.S. 555, 562 (1931); *Dean Foods Company v. Albrecht Dairy Company*, 396 F.2d 652, 658-9 (8 Cir. 1968).

It is not necessary to resolve at this time which alternative—sixfold damages or no treble damage action—the courts might select. The chances are that some judges would adopt each position if either of the proposed bills is passed in its present form, and the Supreme Court would ultimately have to resolve the disagreement. Congress ought to clear up this ambiguity before enacting either bill and avoid the expenditure of judges' time and litigants' money required to obtain a judicial resolution.

The right to treble damages distinguishes antitrust offenses from most other offenses, since the treble damage remedy is not widely available to the victims of crime. Even the Securities Act of 1933 (15 U.S.C. §§77a-77aa) and the Securities Exchange Act of 1934 (15 U.S.C. §§78a-78hh)—two statutes comparable to the antitrust laws in the amount of private litigation they have fostered—do not have treble damage provisions. The private right to sue for violations of those statutes is a judge-created right to single damages. *J. I. Case v. Borak*, 377 U.S. 426, (1964); *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940).

It is my view that, in the case of antitrust offenses, the treble damage remedy is sufficient. To impose quintuple or sextuple damages by adding the fine and restitution provisions included in S.1 and S.1400 would provide greater punishment for antitrust offenses than for other crimes—such as theft, fraud and securities law violations—for which no treble damage recovery is provided.

Disqualification of Officers and Professionals

S.1 also would permit the trial court to disqualify a corporate officer convicted of an antitrust offense "from exercising similar functions in the same or another similar organization" or to disqualify "a member of a licensed profession" convicted of an antitrust offense from "practicing his profession" (S.1, §§1-4A1(c) (S), 1-4A3(b)).

This provision would permit a federal court to fire the convicted executive of an antitrust offender and prevent him from holding a similar job in another corporation. While it is not entirely clear, it would appear that this disqualification could be permanent. Such a remedy conflicts with basic principles of common law which have strictly limited the scope of employees' covenants not to compete because of the public policy against prohibiting a man from earning his livelihood at the work he knows best. See, e.g., *Hedberg v. State Farm Mutual Automobile Insurance Co.*, 350 F.2d 924, 931-2 (8 Cir. 1965); 14 *Williston on Contracts*, Third Edition, 1643 (1972).

The only antitrust case known to me in which disqualification of a corporate officer was ordered was a civil suit. In *United States v. Grinnell Corporation*, 326 F. Supp. 244 (D. Mass. 1964), Judge Wyzanski enjoined the defendants from employing Grinnell's president (Mr. Fleming) "to insure that the reforms imposed [by the Court] were not thwarted by a leader of great capacity but of less than an admirable record of compliance with well-known prescriptions of antitrust law* * *" (236 F. Supp. at 259). Despite this conclusion by the trial judge, the government admitted in the Supreme Court that "the barring of Mr. Fleming from the employment of any of the defendants is unduly harsh and quite unnecessary on this record", and the Supreme Court agreed. *United States v. Grinnell Corporation*, 384 U.S. 563, 576 (1966). Although the Supreme Court said that "relief of this kind may be appropriate where the predatory

conduct is conspicuous" (384 U.S. at 579; Emphasis added), there was no indication by either court that disqualification was an appropriate *punishment*. Both the trial court and the Supreme Court considered it only in the context of injunctive relief in a civil case where it might be necessary to make the remedy effective.

The power given by S.1 to federal courts to disqualify "a member of a licensed profession" presents the same problems as disqualification of an executive, plus possible constitutional difficulties. In antitrust cases, it would have its principal application to the lawyers and accountants who represent, or are employed by, corporations. Lawyers and accountants are licensed by the States, not the federal government. The effect of this provision would be to permit the federal court to revoke the State-granted licenses of lawyers and accountants and thus presents the serious constitutional question whether a federal court order can interfere with the licensing powers of the States.

Suspension from Interstate Commerce

A novel—and drastic—remedy created by S.1 is the power to sentence a convicted corporation to "suspension of the right to affect interstate and foreign commerce" for the period for which an individual could be sentenced to jail for the same offense. (S.1, §-4A1(c) (1)).

Reading this provision raises many questions as to its meaning. Does "suspension of the right to affect interstate and foreign commerce" mean that a corporation can make no sales in such commerce? If so, does it mean that each plant can sell only in the State in which it is located? Or can the corporation sell only in the State where its head office is located or where it is incorporated? Or does the clause mean that the corporation can neither *buy* nor *sell* in interstate commerce? Or does it simply require that the annual dollar amount of the corporation's interstate sales and its interstate purchases remain equal so that there is no *net effect* on interstate commerce? Or does it mean that the corporation can neither increase nor decrease its past sales, since even if it shut down its business it would "affect" interstate commerce?

Regardless of the construction of the provision, its enactment would be unwise. All antitrust offenders are involved in interstate commerce or they would not have been subject to federal antitrust prosecution. Being unable to participate in such commerce for as long as a year (the maximum term of imprisonment for antitrust violations) would, in many cases, be tantamount to shutting the business down. In practice, the consequence of this remedy would probably be so drastic that the penalty would be seldom imposed. However, as long as it is in the statute, it could be used to work harsh results. It would seem to be better omitted, a view that was apparently adopted by the draftsmen of S.1400.

Corporate Probation

Both bills would empower the trial judge to place a corporate antitrust offender on probation. This right is made express in Section 2001(c) of S.1400 and would appear to be permitted by Section 1-4A1(c) (6) of S.1. That section applies to any "offender", and, although "offender" is not defined, there seems to be no reason why corporations cannot be offenders under S.1.

Corporate probation is a difficult concept since probation has traditionally been a means for rehabilitating human beings. The "basic purpose of probation" under present law is to create "an individualized program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement under the tutelage of a probation official* * *" *Roberts v. United States*, 320 U.S. 264, 272 (1943).

Even under the proposed bills, probation is designed for human beings, as a review of the conditions of probation set forth in S.1 (§ 1-402) and S.1400 (§ 2103) indicates. It is difficult, for example, to see how a corporation could be ordered to support his family, undergo psychiatric treatment or refrain from the excessive use of alcohol. To be sure, a corporation could be required to make restitution, pay a fine, refrain from "consorting with specified persons or engaging in conduct similar to that constituting the offense for which he has been convicted" or "comply with any other condition deemed by the court to be reasonably related to * * * the rehabilitation of the offender" (S.1, §1-4D2; S.1400, §2103; the quotations are from S.1 but the concepts appear in both bills).

These conditions—except for restitution and fines which could be imposed without probation—sound like injunctive conditions. But a sentence is generally imposed at the end of a criminal trial without the full adversary, evidentiary hearing that is customarily held before an injunction is entered in antitrust cases. The Supreme Court has repeatedly emphasized the need for a full exploration of the facts in framing an antitrust decree. In 1945 it said in *Associated Press v. United States* 326 U.S. 1, 22, a Sherman Act case:

"The fashioning of a decree in an antitrust case in such way as to prevent future violations and eradicate existing evils, is a matter which rests largely in the discretion of the court. (Quotation omitted.) A full exploration of facts is usually necessary in order properly to draw such a decree."

In 1972, it repeated this concept in *United States v. Ford Motor Co.*, 405 U.S. 562, after noting that the "district Court * * * held nine days of hearings on the remedy" (405 U.S. at 571):

"The thorough and thoughtful way the District Court considered all aspects of this case, including the nature of the relief, is commendable. The drafting of such a decree involves predictions and assumptions concerning future economic and business events. Both public and private interests are involved; * * *" (405 U.S. at 578).

Because of the complexity of these questions, extensive evidentiary hearings on relief are held as a matter of course in antitrust cases. E.g., *United States v. E. I. DuPont de Nemours & Co.*, 353 U.S. 586 (1957); *United States v. E. I. DuPont de Nemours & Co.*, 366 U.S. 316 (1961); *United States v. Brown Shoe Co.*, 179 F.Supp. 721, 741-42 (E.D. Mo. 1959), aff'd. 370 U.S. 294 (1962); *United States v. Kimberly-Clark Corp.*, 264 F.Supp. 439, 465 (N.D. Calif. 1967); *United States v. El Paso Natural Gas Co.*, 1972 Trade Cas. ¶74,135 (D. Colo. 1972)

The public would be ill-served if probation imposed in a non-adversary, non-evidentiary proceeding at the end of criminal antitrust cases were to be substituted for the carefully constructed antitrust decrees presently entered in civil cases after full consideration of evidentiary records made especially for that purpose. In fact, in the only federal case to have considered the possibility of corporate probation—*United States v. Atlantic Richfield Company*, 465 F.2d 58 (7 Cir 1971)¹—the Court of Appeals, after concluding that probation could be imposed on a corporation in proper circumstances, reversed the probation imposed Atlantic Richfield because the condition specified (completion in 45 days of a program to control oil spillage) was unreasonable on the record made in the District Court.

On the other hand, if a full evidentiary hearing is to become part of the sentencing procedure when corporate probation is to be imposed—and neither S.1 nor S.1400 appears to contemplate such a change—what is gained by making it a part of the criminal proceeding? The government will have the benefit of collateral estoppel in the subsequent injunction action on questions of violation so the civil injunction case will involve no more effort than the probation hearing in the criminal case. Filing a separate civil case will, moreover, avoid the question, presented at an evidentiary probation hearing, whether the government must prove the need for the restraints to be imposed beyond a reasonable doubt or simply by a preponderance of the evidence.

Another unanswered question about corporate probation is the role of the probation officer. If supervision of a corporate offender is required, probation officers who are trained and experienced in the supervision of individual criminals would be a poor choice. The law already contains an extensive body of law governing the appointment of receivers for corporations that are not to be trusted to manage their own affairs. It would seem to be preferable—for all of the reasons just discussed in connection with injunctions—to have the trial court appoint a receiver in a civil proceeding after full hearing instead of granting a probation officer supervisory powers over the corporation as part of a sentence imposed at the end of a criminal trial. It should be noted in this

¹ The only State court case to consider the question held that corporations could not be put on probation. *State ex rel. Howell County v. West Plains Telephone Company*, 135 SW 20 (Mo. Sup. Ct. 1911); see also *United States v. ABC Freight Forwarding Corp.*, 112 F. Supp 190-191 (S.D. N.Y. 1953) (where the judge avoided the question by announcing "The issue of whether or not a corporation can be placed on probation does not arise, for I am unwilling to impose probation upon these defendants").

connection that one of the aspects of the probation which was reversed in the *Atlantic Richfield* case was the conditional appointment of a "Special Probation Officer with Powers of a Trustee under supervision of the court". (465 F.2d at 59).

Although the report which my committee submitted on behalf of the anti-trust section did not engage in the foregoing reasoning, the conclusion of the Antitrust Section was "that corporations should be exempted from probation pending additional analysis of actual experience under existing sanctions applicable to corporations".

Notice of Conviction

Finally, both S.1 and S.1400 would permit the trial court to require a corporation or an individual convicted of an antitrust offense to give notice of the conviction to the "class of persons or sector of the public affected by the conviction" by appropriate means, including "advertising in designated areas or designated media". (S.1, § 1-4A(c) (7) ; S.1400, §§ 2001(c), 2004). In speaking of this remedy the report submitted by my committee on behalf of the Antitrust Section said :

"First, the sanction may serve to notify those persons who may have a claim against the convicted organization. Second, this notice sanction will have an obvious deterrent effect upon potential organizational offenders. A requirement that notice of conviction be widely disseminated may be a most effective deterrent to the image-conscious corporation. This section provides a needed and viable alternative sanction for organization offenders."

There is, however, one important difference in the language between Section 1-4A(c) (7) in S.1 and Section 2004 in S.1400. The provision in S.1 requires that the offender give notice to the "class of persons or sector of the public affected by the conviction", while S.1400 requires that notice be given "to the class of persons or to the sector of the public affected by the conviction *or financially interested in the subject matter of the offense*". (Emphasis supplied.)

The additional language in S.1400 is helpful. The only victims "affected by the conviction"—the sole standard in S.1—would be those whose right to sue for damages is enhanced by the conviction, such as treble damage plaintiffs under the antitrust laws. However, anyone who was damaged by the offense and could sue even without the conviction—for example, the victim of a scheme to defraud—would come within the description "financially interested in the subject matter of the offense". Notice to this broader class of persons would appear desirable to me, even though it would have no effect in the antitrust field itself.

CONCLUSION

I hope that this discussion has uncovered, for your consideration, some unexpected problems which arise when the provisions of S.1 and S.1400 are applied to antitrust offenses. But they are not all of the problems. I am just one antitrust lawyer. Other antitrust practitioners would see other consequences in S.1 and S.1400, and might evaluate the provisions we have discussed today differently than I do. Even I, given more time to consider these bills, would have additional comments to make.

The changes which S.1 and S.1400 make in the antitrust laws constitute the most extensive revision of the antitrust statutes since the enactment of the Clayton Act in 1914. If changes of such magnitude are to be made, let it be after full consideration by the Senate Subcommittee on Antitrust and Monopoly as part of a bill having as its primary purpose the modification of the antitrust policies of the United States.

RESOLUTION

Whereas the National Commission on Reform of Federal Criminal Laws established by the Congress pursuant to P.L. 89-801 (the "Brown Commission") has prepared a Final Report recommending changes in the Federal criminal laws and a recodification thereof in Title 18, U.S. Code:

Whereas the Criminal Practice and Procedure Committee of the Antitrust Section has studied those recommendations of the Brown Commission which

bear significantly upon the criminal enforcement of the Federal antitrust laws and has submitted to the Council of the Antitrust Section a report with respect to such recommendations;

Whereas the Council has reviewed the report of the Criminal Practice and Procedure Committee and determined that the report fairly reflects the views of the Antitrust Section with respect to the recommendations of the Brown Commission which bear significantly upon the criminal enforcement of the Federal antitrust laws;

Now, therefore, *BE IT RESOLVED* by the Council of the Antitrust Section that the report of the Criminal Practice and Procedure Committee on the Final Report of the National Commission on Reform of Federal Criminal Laws be, and hereby is, adopted as the report of the Antitrust Section; and

Be it further resolved that the report of the Criminal Practice and Procedure Committee be presented to the House of Delegates, American Bar Association, as the report of the Antitrust Section on the Final Report of the National Commission on Reform of Federal Criminal Laws.

REPORT OF THE CRIMINAL PRACTICE AND PROCEDURE COMMITTEE, ANTITRUST SECTION, AMERICAN BAR ASSOCIATION ON THE FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS

The National Commission on Reform of Federal Criminal Laws, established by Congress pursuant to P.L. 89-801 (the "Brown Commission") has, in its Final Report, proposed a codification of Title 18 of the U.S. Code. Since the criminal antitrust laws are in Title 15, the proposed Code will seemingly have primary significance in its procedural effects. The Committee's comments will therefore be directed most specifically in that vein. In lieu of broad approval or disapproval, the Committee has generally limited its comments to those sections which we believe require affirmative or negative responses because they would seemingly affect existing statutory or case law in the antitrust field.

PART A—GENERAL PROVISIONS

Chapter 4—Complicity; Sections 402(1)(a), 403(4).¹

In general, the criminal complicity chapter of the proposed new Federal Criminal Code codifies existing statutory and case law regarding corporate, individual and accomplice liability for conduct performed by or on behalf of another. The proposed new Code adds clarity and specificity to this area. With the exception of § 402(1)(a) and § 403(4), the suggested provisions of Chapter 4 have no effect upon criminal antitrust law.

Proposed § 402(1)(a) recommends adoption of a definition of corporate liability consistent with existing law. Bracketed alternative § 402(1)(a) would hold corporations broadly liable for all offenses, including felonies, even if the agent's conduct were outside the scope of his employment, should it be found to have been recklessly tolerated by the supervisor, or ratified after the fact. With respect to the Sherman Act, violation of which is a misdemeanor, the bracketed alternative is preferable provided the words "recklessly tolerated" are deleted. Such words are too nebulous and too susceptible to varying interpretations. At least where the offense is a misdemeanor, there is no good reason why a corporation should not be held responsible for activities conducted in furtherance of its affairs when those engaging in the conduct fall within the classes set forth in (1)(a)(i)–(iv).

Proposed § 403 defines individual accountability for conduct on behalf of an organization. We agree with the provisions of the first three subsections.

Subsection 4 of § 403 provides that a person who is responsible for supervising the "relevant activities of a [corporation] is guilty of an offense if he *manifests his assent* to the commission of an offense for which the organization may be convicted *by his willful default in supervision* within the range of that responsibility which contributes to the occurrence of that offense." (Emphasis supplied.)

While a minority of the Committee agrees with § 403(4), the majority of the Committee considers it dangerously overbroad and bearing considerable potential for abuse. The command responsibility theory, on which § 403(4) is apparently based, could easily and foreseeably produce harsh and unfair results,

¹ The text of the sections discussed will be found in an appendix to this report.

in the view of the majority. "Willful" default includes a mere knowing default in supervision. It is but a legal fiction to hold such a default to be "manifest assent" to the commission of a crime. Delegations of authority vary from corporation to corporation. Moreover, within a single corporation, actual delegations of authority sometimes differ from those outlined in the corporate organizational chart. It would become risky indeed to subject supervisory responsibilities to this form of second guessing. Rigidity in corporate organizational structure might be the consequence.

A majority of the Committee believes that § 403(4) invites unduly broad application of the criminal laws to individual defendants in a corporate structure, particularly where detailed supervision is impossible and delegation of authority frequent. A company official should not be absolved from responsibility for the activities of those working under him merely because he did not engage in or specifically authorize the forbidden acts. However, in the judgment of a majority of the Committee, the dangers implicit in determining a "default of supervision" are too real to warrant the enactment of Subsection 4.

Chapter 6—Defenses Involving Justification and Excuse; Section 609.

Section 609 would assure the criminal antitrust defendant the affirmative defense of mistake of law. In order to prevail upon such a defense, the defendant would have to demonstrate by a preponderance of the evidence his "good faith belief that [his] conduct does not constitute a crime" and that he acted "in reasonable reliance upon a statement of law contained in (a) a statute or other enactment, (b) a judicial decision, opinion, order or judgment, (c) an administrative order or grant of permission, or (d) an official interpretation of the public servant or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the crime." Consultation with a lawyer and full disclosure to the lawyer of all relevant facts, would, in most instances, be required to demonstrate good faith. (See Comment to Section 609). But reliance upon a lawyer's opinion, in and of itself, would be insufficient to sustain the defense.² Reliance would have to be based ultimately upon a statute, judicial decision, administrative order or official interpretation from the Antitrust Division. It is the Committee's belief, however, that good faith reliance on an attorney's advice is a factor to be considered by the court in imposing sentence.

Chapter 7—Temporal and Other Restraints on Prosecution; Section 701.

Section 701 would reduce the statute of limitations period for criminal antitrust prosecutions from five years to three years.

Prior to 1954, the criminal antitrust statute of limitations was three years.³ In 1954, however, this period was lengthened to five years by means of an Act designed "to prohibit payment of annuities to officers and employees of the United States convicted of certain offenses."⁴ That Act was apparently prompted by government employee scandals and not by any particular consideration of the policies relevant to criminal antitrust enforcement; however, the five year statute of limitations was apparently adopted generally for most federal crimes. It is the Committee's opinion that it is appropriate to return to the three-year statute of limitations for criminal antitrust cases which are misdemeanors by definition.

PART B—SPECIFIC OFFENSES

Chapter 10—Offenses of General Applicability; Sections 1001, 1004, 1006.

Sections 1001 and 1004 respectively create the substantive offenses of "criminal attempt" and "criminal conspiracy." Section 1005 provides that whenever "attempt" or "conspiracy" are made offenses elsewhere in the federal statutes [as they are in Section 2 (attempt to monopolize) and Section 1 (conspiracy in restraint of trade) of the Sherman Act], such offenses shall be defined as under §§ 1001 and 1004. If the Committee's analysis is correct, the adoption of these sections would wipe out 81 years of case law defining these offenses

² There was provision for reliance upon counsel in the original draft of Section 609 but this provision was removed to avoid the possibility of a deliberately created defense. See Working Papers of the Brown Commission, pp. 138-139.

³ Act of April 13, 1876, Ch. 56, 19 Stat. 32.

⁴ 18 U.S.C. § 3282; Pub. L. 83-769 (September 1, 1954).

under the Sherman Act. The absence of a need for statutory definition of the antitrust offenses of a "conspiracy" and "attempt," due to the existing body of judge made law defining these offenses, and the inappropriateness to antitrust of generalized definitions, are the primary reasons the Committee opposes these sections.

Section 1006 pertains to "regulatory offenses." It would govern the use of sanctions to enforce a penal regulation whenever and to the extent that another statute so provides. "Penal regulation" is defined as "any requirement of a statute, regulation, rule, or order which is enforceable by criminal sanctions, forfeiture or civil penalty." The Comment on § 1006 states that there are many offenses in the United States Code which, although they do not belong in the Criminal Code, should be subject to criminal or quasi-criminal sanctions and that "Section 1006 represents a novel method for achieving consistency in penal policy with respect to regulatory offenses."

It is apparent from the Comment that § 1006 would apply to business regulations, and, therefore, it would seem quite clearly to apply to those federal antitrust statutes carrying criminal sanctions. Moreover, the definition of "Penal Regulation" seems to embrace final FTC cease and desist orders, since they are enforceable by civil penalties. Thus, by virtue of § 1006 violation of final FTC cease and desist orders could be made a misdemeanor. Section 1006 also raises the spectre of trade regulation rules carrying criminal sanctions.

Applying criminal sanctions to FTC orders and /or Trade Regulation Rules would reflect both a significant and substantial departure from present concepts of antitrust jurisprudence. To date there has been no empirical evidence to suggest that so severe a sanction is the best means of achieving the results intended by these FTC procedures. It is the opinion of a majority of the Committee on Criminal Practice and Procedure and the Antitrust Section acting through its Council that the present non-criminal sanctions should be retained, and that further experience with present enforcement techniques be studied in detail before determining if penal sanctions would appropriately apply in such situations. Accordingly, a majority of the Committee and the Antitrust Section recommend that FTC orders and Trade Regulations Rules should be excepted from Section 1006 and the definition of "Penal Regulation", pending further study.

Chapter 13—Integrity and Effectiveness of Government Operations Physical Obstruction of Government Function and Related Offenses; Section 1323.

Section 1323 makes it a criminal offense to alter, destroy, mutilate, conceal or perverts prosecution for a felony." In all other cases it is a Class A Misdemeanor if the actor believes that an official proceeding is pending or about to be instituted, or that process, demand or order for the seizure, production, copying, discovery or examination of a record, document or thing has been issued or will be issued.

The crime is a Class C Felony if the actor "substantially obstructs, impairs or perverts prosecution for a felony." In all other cases it is a Class A Misdemeanor.

Section 1323(4) confers federal jurisdiction under this section whenever the official proceeding mentioned in the section is or would be a federal proceeding, or when the "process, demand or order has been or would be issued by a federal public servant."

This section is intended to resolve some of the same ambiguities and difficulties which have arisen under 18 U.S.C. §§ 1503 and 1505. It also focuses on the intent and culpability of the actor rather than on the existence or lack of existence of a federal official proceeding. It does, however, substitute a new line in that it requires, in each case, an answer to the question of whether the defendant believes that a federal proceeding is "pending or about to be instituted."

The ambiguities of the proposed section are probably not subject to great difficulty in application since it would seem likely that prosecution under that section would occur only when the actor has notice that a proceeding is pending or about to be instituted and then proceeds to destroy records and documents which are clearly relevant to that proceeding.

On the whole, it is believed that § 1323 is a worthwhile addition to the Federal Criminal Code and should be adopted.

Perjury, False Statements and Integrity of Public Records; Sections 1351, 1371.

Section 1351.—We agree with the section as stated except that we would enact the alternate subsection (2) which is in brackets immediately following the unbracketed subsection (2).

This section puts some badly needed teeth in the federal perjury statute. As long as the two witness corroboration rule in perjury cases is being eliminated, we can see no reason for the requirement in the unbracketed subsection (2) to the effect that conviction may not be had for perjury when proof of falsity is "solely upon contradiction by the testimony of one person." We agree with a minority of the Commission that the requirement of corroboration is outmoded and that the perjury offense ought to be treated like any other, allowing the jury to make the final determination of guilt based upon whatever evidence is before it.

Section 1371.—The Committee disagrees with this proposed section.

It seems to us that it is difficult for any public servant to make a judgment as to whether or not information which he has available to him has been made available to the United States Government "under a governmental assurance of confidence." Because of this, public officials would be reluctant to give out information to anyone on subjects which are clearly not intended to be within the scope of such a statute. Existing law appears to adequately safeguard the respective interests of the Government and the public.

A somewhat allied problem outside the Commission's Report, and not covered by the proposed Code, concerns the submission of "privileged" documents to the Government. The Committee is satisfied with existing privilege protection now afforded private litigants in their relations with the Government via the procedures for "in camera" treatment. It therefore recommends no change at this time in those procedures which have been developed through years of experience in adversary proceedings.

PART C—THE SENTENCING SYSTEM

Chapter 30—General Sentencing Provisions; Section 3007.

Section 3007, "Special Sanction for Organizations," provides a special sanction for federal organizational offenders in that the court in its discretion may require the organization to give notice of its conviction (either by mail, by advertising, or otherwise) to those ostensibly harmed by the offense for which the organization was convicted.

The section's rationale appears to be twofold. First, the sanction may serve to notify those persons who may have a claim against the convicted organization. Second, this notice sanction will have an obvious deterrent effect upon potential organizational offenders. A requirement that notice of conviction be widely disseminated may be a most effective deterrent to the image-conscious corporation.

This section provides a needed and viable alternative sanction for organization offenders.

Chapter 31—Probation and Unconditional Discharge; Section 3101.

Section 3101 of the Report proposes spelling out (for the first time as a matter of Federal statutory law) the criteria to be used by judges in considering whether to impose a "sentence" of probation (as it would be called under the new section) instead of imprisonment. Subsection (2) provides that the court shall not sentence to prison unless such a sentence is more appropriate than probation because either (a) there is undue risk that the defendant will commit another crime during probation; (b) the defendant is in need of correctional treatment that can most effectively be provided in prison; or (c) probation or unconditional discharge would unduly depreciate the seriousness of the defendant's crime, or undermine respect for law.

Subsection (3) lists a number of factors to be considered regarding probation. Among other things, these include whether the defendant intended harm, will make restitution, has a prior history of criminal activity, and "is particularly likely to respond affirmatively to probationary treatment." If probation is ordered for a misdemeanor, it will generally be for a period of two years unless terminated earlier pursuant to Section 3102.

It appears that the new provisions would tend to encourage probation rather than imprisonment for the antitrust offender, particularly if he acted misguid-

edly but in good faith. Since that seems to be the just result, we approve the provisions of Section 3101 insofar as they apply to individuals.

A reference to the definitional section of The Brown Commission Report suggests that corporations would be included within the meaning of "person". Both the concept and the practicalities of implementing probation for corporations created many difficulties for a majority of the Committee on Criminal Practice and Procedure of the Antitrust Section. Therefore, it was the majority's view and the view of the Antitrust Section, acting through its Council, that corporations should be exempted from probation pending additional analysis of actual experience under existing sanctions applicable to corporations.

Chapter 32—Imprisonment; Section 3201.

At present, imprisonment under federal criminal law involves an indefensible variety of sentences totally lacking sensible classification as to the seriousness of the different crimes.

This variety and complexity of combinations of sentences possible is well illustrated by the chaos which reigns in Title 18 of the United States Code. In Title 18 alone, there are not less than 17 different maximum terms, apart from death penalty: Life, 30 years, 25 years, 20 years, 15 years, 10 years, 7 years, 6 years, 5 years, 4 years, 3 years, 2 years, 1 year, 6 months, 3 months, 90 days, and 30 days. Associated with these maximum imprisonment levels is a bewildering variety of maximum fines. For example, there are about 150 offenses in Title 18 carrying maximum imprisonment of one year. Eight different fine levels can be found associated with these one-year jail offenses: in one section the maximum fine will be \$10,000, in another \$3,000 or \$300. One, for no apparent reason, carries no fine, but can be punished only by imprisonment. Only occasionally and as if by chance are fines related to the amount of injury done or gain realized by the offender, and then the ratio of fine to amount involved may be one-to-one, two-to-one, or three-to-one.⁵

When imposing a minimum term the nature and circumstances of the particular offense and the history and character of the defendant must be considered. The reasons for imposing a minimum term must be set forth by the court in detail. In all but the most extraordinary cases the court should obtain both a presentence report and a report from the Bureau of Corrections under Section 3004 before imposing a minimum term.

Subsection 4 provides that instead of imposing a minimum term the court may make a recommendation to the Board of Parole as to when the defendant should first be considered for parole. Subsection 4 further provides that the recommended parole eligibility date may not be beyond the time the court could have fixed for a minimum term under Subsection 33. This subsection also grants the court authority to reduce an imposed minimum term to the time served upon motion of the Bureau of Corrections made at any time, on notice to the United States Attorney.

Section 3201 changes present law under which the period of parole is equivalent to the balance of any unserved prison sentence. Paradoxically, at present, if an offender progresses rapidly he is released early with a subsequent long period of supervision; but if he is a poor risk, he is kept in prison till the end of his sentence. The result is that the readjustment to life on the outside for the poor-risk prisoner is virtually unsupervised.

The proposed Title 18 of the United States Code would view parole as a transitional process necessary for every offender sent to prison. It recognizes that the length of time for serving parole should not be inversely proportional to the prison sentence.

Under present law all prison sentences have a minimum term. This term must be served by the offender in prison before becoming eligible for parole unless the court affirmatively acts pursuant to 18 U.S.C. § 4208. Because it is difficult to predict at the time of sentencing when a particular offender will be ready for parole, the present system may keep an individual in prison after the optimum time for his release. The proposed Section 3201 provides greater flexibility for judges through utilization of the concept of prison component, the parole component, and minimum term, where applicable.

The flexibility given to the court may be particularly important as applied to white collar crime. As stated by Andenaes, *Does Punishment Deter Crime?*,

⁵ See Working Papers of the Brown Commission, p. 1250.

11 Crim. Law Q. 75, 89-90 (1968), the "short, sharp, shock"—the psychological blow from merely entering the jail cell—may serve to drive home the danger of unlawful actions. After the initial impact the court may reduce the sentence of the white collar criminal so the individual could return to the business world but with a better appreciation of the ramifications flowing from illegal activities.

Section 3201 assumes that every felon released from a federal prison is subject to a period of parole supervision. This would be an abandonment of the conventional attitudes of parole as a mitigation of the sentence of imprisonment. Rather, by viewing parole as a component of the sentence for rehabilitation purposes, it is possible to end the irrationality of making parole time inversely proportional to time actually served in prison and to move constructively toward a better rehabilitation system in our federal prisons. The result would be an orderly federal sentencing system to replace the chaos which now exists under federal criminal law.

Chapter 35—Disqualification from Office and Other Collateral Consequences of Conviction; Section 3502.

It is the view of the Committee that disqualification from *private* office as a collateral consequence of conviction is an unwarranted sanction excessive in scope and questionable on Constitutional grounds as tantamount to a bill of attainder. Disqualification from public office seems to the Committee appropriate in certain instances and should properly be left to the discretion of the court.

Discovery and Procedure Before Trial

While once again outside the specific consideration of the Commission or proposed Code, the Committee felt it appropriate to comment briefly on this area.

A majority of the Committee basically agrees with the standards relating to Discovery and Procedure Before Trial recommended by the Special Committee on Standards For the Administration of Criminal Justice and approved by the ABA House of Delegates in August 1970, but takes exception to Part III, Disclosure to Prosecution, 3.2 Medical and Scientific Reports. It is the view of a majority of the Committee that only those results or testimony relative thereto which defense counsel intends to use at a hearing or trial should be discoverable and that the deletion of this safeguard in the amended recommendations as adopted by the House of Delegates was unfortunate.

Respectfully submitted,

DENIS MCINERNEY,
Chairman.

APPENDIX TO REPORT

402. Corporate Criminal Liability

(1) Liability Defined. A corporation may be convicted of:

(a) any offense committed by an agent of the corporation within the scope of his employment on the basis of conduct authorized, requested or commanded, by any of the following or a combination of them:

[(a) any offense committed in furtherance of its affairs on the basis of conduct done, authorized, requested, commanded, ratified or recklessly tolerated in violation of a duty to maintain effective supervision of corporate affairs, by any of the following or a combination of them:]

(i) The board of directors;

(ii) An executive officer or any other agent in a position of comparable authority with respect to the formulation of corporate policy or the supervision in a managerial capacity of subordinate employees;

(iii) Any person, whether or not an officer of the corporation, who controls the corporation or is responsibly involved in forming its policy;

(iv) Any other person for whose act or omission the statute defining the offense provides corporate responsibility for offenses;

403. Individual Accountability for Conduct on Behalf of Organizations.

(4) Default in Supervision. A person responsible for supervising relevant activities of an organization is guilty of an offense if he manifests his assent to the commission of an offense for which the organization may be convicted

by his willful default in supervision within the range of that responsibility which contributes to the occurrence of that offense. Conviction under this subsection shall be of an offense of the same class as the offense for which the organization may be convicted, except that if the latter offense is a felony, conviction under this subsection shall be for a Class A misdemeanor.

§ 609. Mistake of Law.

Except as otherwise expressly provided, a person's good faith belief that conduct does not constitute a crime is an affirmative defense if he acted in reasonable reliance upon a statement of the law contained in:

- (a) A statute or other enactment;
- (b) A judicial decision, opinion, order or judgment;
- (c) An administrative order or grant of permission; or
- (d) An official interpretation of the public servant or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the crime.

§ 701. Statute of Limitations.

(1) *Bar*.—A prosecution shall be barred if it was commenced after the expiration of the applicable period of limitation.

(2) *Limitation Periods Generally*.—Except as provided in subsections (3)–(5), prosecution must be commenced within the following periods after the offense:

(a) Ten years for sections 1101 (Treason), 1102 (Participating in or Facilitating War Against the United States Within Its Territory) and 1112 (Espionage). Any prosecution commenced more than five years after the offense shall be dismissed if the defendant, on a motion addressed to the court, establishes by a preponderance of the evidence that the crime and his connection with it were known to responsible officials for more than one year prior to commencement of prosecution and that prosecution could, with reasonable diligence, have been commenced more than one year prior to its commencement;

(b) Five years for all other felonies; and

(c) Three years for all other offenses.

(3) *Extended Period for Murder*.—Murder may be prosecuted at any time. Any prosecution commenced more than ten years after the offense shall be dismissed if the defendant, on a motion addressed to the court, establishes by a preponderance of the evidence that the crime and his connection with it were known to responsible officials for more than one year prior to commencement of prosecution and that prosecution could, with reasonable diligence, have been commenced more than one year prior to its commencement.

(4) *Extended Period for Organized Crime and Official Cover-Ups*.—The period of limitation shall be ten years for any felony committed in the course of the operation of a criminal syndicate involving connivance of a public servant. A prosecution which is timely only by virtue of this subsection shall be dismissed as to any defendant who, on a motion addressed to the court, establishes by a preponderance of the evidence that he was not a leader of the criminal syndicate or a public servant conniving in any part of the criminal business charged, or that the crime and his connection with it were known to responsible officials other than conniving participants more than one year prior to commencement of prosecution and prosecution could, with reasonable diligence, have been commenced more than one year prior to its commencement. "Leader" means one who organizes, manages, directs, supervises or finances a criminal syndicate or knowingly employs violence or intimidation to promote or facilitate its criminal objects, or with intent to promote or facilitate its criminal objects, furnishes legal, accounting or other managerial assistance. A "criminal syndicate" is an association of ten or more persons for engaging on a continuing basis in felonies of the following character: illicit trafficking in narcotics or other dangerous substances, liquor, weapons, or stolen goods; gambling; prostitution; extortion; bribery; theft of property having an aggregated value of more than \$100,000; engaging in a criminal usury business; counterfeiting; bankruptcy or insurance frauds by arson or otherwise; and smuggling. If more than ten persons are so associated, any group of ten or more associates is a "criminal syndicate" although it is or was only a part of a larger association. Association, within the meaning of this subsection, exists among persons engaged in carrying on the criminal operation although:

(a) Associates may not know each other's identity;

(b) Membership in the association may change from time to time; and

(c) Associates may stand in a wholesaler-retailer or other arm's length relationship in an illicit distribution operation.

(5) *Extended Period to Commence New Prosecution.*—If a timely complaint, indictment or information is dismissed for any error, defect, insufficiency or irregularity, a new prosecution may be commenced within three months after the dismissal even though the period of limitation has expired at the time of such dismissal or will expire within such three months.

(6) *Commencement of Prosecution.*—(a) A prosecution is commenced upon the filing of a complaint before a judicial officer of the United States empowered to issue a warrant or upon the filing of an indictment or information. Commencement of prosecution for one offense shall be deemed commencement of prosecution for any included offenses.

(b) A prosecution shall be deemed to have been timely commenced notwithstanding that the period of limitation has expired:

(i) For an offense included in the offense charged, if as to the offense charged the period of limitation has not expired or there is no such period, and there is, after the evidence on either side is closed at the trial, sufficient evidence to sustain a conviction of the offense charged; or

(ii) For any offense to which the defendant enters a plea of guilty or nolo contendere.

§ 1001. Criminal Attempt.

(1) *Offense.*—A person is guilty of criminal attempt if, acting with the kind of culpability otherwise required for commission of a crime, he intentionally engages in conduct which, in fact, constitutes a substantial step toward commission of the crime. A substantial step is any conduct which is strongly corroborative of the firmness of the actor's intent to complete the commission of the crime. Factual or legal impossibility of committing the crime is not a defense if the crime could have been committed had the attendant circumstances been as the actor believed them to be.

(2) *Complicity.*—A person who engages in conduct intending to aid another to commit a crime is guilty of criminal attempt if the conduct would establish his complicity under section 401 were the crime committed by the other person, even if the other is not guilty of committing or attempting the crime, for example, because he has a defense of justification or entrapment.

(3) *Grading.*—Criminal attempt is an offense of the same class as the offense attempted, except that (a) an attempt to commit a Class A felony shall be a Class B felony, and (b) whenever it is established by a preponderance of the evidence at sentencing that the conduct constituting the attempt did not come dangerously close to commission of the crime, an attempt to commit a Class B felony shall be a Class C felony and an attempt to commit a Class C felony shall be a Class A misdemeanor.

(4) *Jurisdiction.*—There is federal jurisdiction over an offense defined in this section as prescribed in section 203.

§ 1004. Criminal Conspiracy.

(1) *Offense.*—A person is guilty of conspiracy if he agrees with one or more persons to engage in or cause the performance of conduct which, in fact, constitutes a crime or crimes, and any one or more of such persons does an act to effect an objective of the conspiracy. The agreement need not be explicit but may be implicit in the fact of collaboration or existence of other circumstances.

(2) *Parties to Conspiracy.*—If a person knows or could expect that one with whom he agrees has agreed or will agree with another to effect the same objective, he shall be deemed to have agreed with the other, whether or not he knows the other's identity.

(3) *Duration of Conspiracy.*—A conspiracy shall be deemed to continue until its objectives are accomplished, frustrated or abandoned. "Objectives" includes escape from the scene of the crime, distribution of booty, and measures, other than silence, for concealing the crime or obstructing justice in relation to it. A conspiracy shall be deemed to have been abandoned if no overt act to effect its objectives has been committed by any conspirator during the applicable period of limitations.

(4) *Defense Precluded.*—It is no defense to a prosecution under this section that the person with whom such person is alleged to have conspired has been

acquitted, has not been prosecuted or convicted, has been convicted of a different offense, is immune from prosecution, or is otherwise not subject to justice.

(5) *Liability as Accomplice.*—Accomplice liability for offenses committed in furtherance of the conspiracy is to be determined as provided in section 401.

(6) *Grading.*—Conspiracy shall be subject to the penalties provided for attempt in section 1001(3).

(7) *Jurisdiction.*—There is federal jurisdiction over an offense defined in this section as prescribed in section 203.

§ 1005. General Provisions Regarding Sections 1001 to 1004.

(2) Attempt and Conspiracy Offenses Outside this Chapter. Whenever “attempt” or “conspiracy” is made an offense outside this Chapter, it shall mean attempt or conspiracy, as the case may be, as defined in this Chapter.

§ 1006. Regulatory Offenses.

(1) *Section Applicable When Invoked by Another Statute.*—This section shall govern the use of sanctions to enforce a penal regulation whenever and to the extent that another statute so provides. The limits on a sentence to pay a fine provided in Part C of this Code shall not apply if the other statute fixes a different limit. “Penal regulation” means any requirement of a statute, regulation, rule, or order which is enforceable by criminal sanctions, forfeiture or civil penalty.

(2) *General Scheme of Regulatory Sanctions.*—(a) *Nonculpable Violations.*—A person who violates a penal regulation is guilty of an infraction. Culpability as to conduct or the existence of the penal regulation need not be proved under this paragraph, except to the extent required by the penal regulation.

(b) *Willful Violations.*—A person who willfully violates a penal regulation is guilty of a Class B misdemeanor. Willfulness as to both the conduct and the existence of the penal regulation is required.

(c) *Flouting Regulatory Authority.*—A person is guilty of a Class A misdemeanor if he flouts regulatory authority by willful and persistent disobedience of any body of related penal regulations.

(3) *Dangerous Violations of Prophylactic Regulations.*—A person is guilty of a Class A misdemeanor if he willfully violates a penal regulation and thereby in fact, creates a substantial likelihood of harm to life, health, or property, or of any other harm against which the penal regulations was directed.

§ 1323. Tampering With Physical Evidence.

(1) *Offense.*—A person is guilty of an offense if, believing an official proceeding is pending or about to be instituted or believing process, demand or order has been issued or is about to be issued, he alters, destroys, mutilates, conceals or removes a record, document or thing with intent to impair its verity or availability in such official proceeding or for the purposes of such process, demand or order.

(2) *Grading.*—The offense is a Class C felony if the actor substantially obstructs, impairs or perverts prosecution for a felony. Otherwise it is a Class A misdemeanor.

(3) *Definition.*—In this section “process, demand or order” means process, demand or order authorized by law for the seizure, production, copying, discovery or examination of a record, document or thing.

(4) *Jurisdiction.*—There is federal jurisdiction over an offense defined in this section when the official proceeding which is pending or contemplated is or would be a federal official proceeding or when the process, demand, or order is or would be issued by a federal public servant.

§ 1351. Perjury.

(1) *Offense.*—A person is guilty of perjury, a Class C felony, if, in an official proceeding, he makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a false statement previously made, when the statement is material and he does not believe it to be true.

(2) *Corroboration.*—No person shall be convicted of perjury where proof of falsity rests solely upon contradiction by the testimony of one person.

[(2) *Proof.*—Commission of perjury need not be proved by any particular number of witnesses or by documentary or other types of evidence.]

(3) *Inconsistent Statements.*—Where in the course of one or more official proceedings, the defendant made a statement under oath or equivalent affirmation inconsistent with another statement made by him under oath or equivalent affirmation,

lent affirmation to the degree that one of them is necessarily false, both having been made within the period of the statute of limitations, the prosecution may set forth the statements in a single count alleging in the alternative that one or the other was false and not believed by the defendant to be true. Proof that the defendant made such statements shall constitute a *prima facie* case that one or the other of the statements was false; but in the absence of sufficient proof of which statement was false, the defendant may be convicted under this section only if each of such statements was material to the official proceeding in which it was made.

(4) *Jurisdiction*.—There is federal jurisdiction over an offense defined in this section when the official proceeding is a federal official proceeding.

§ 1371. Disclosure of Confidential Information Provided to Government.

A person is guilty of a Class A misdemeanor if, in knowing violation of a duty imposed on him as a federal public servant, he discloses any confidential information which he has acquired as a federal public servant. "Confidential information" means information made available to the United States government under a governmental assurance of confidence.

§ 3007 Special Sanction for Organizations.

When an organization is convicted of an offense, the court may require the organization to give notice of its conviction to the persons or class of persons ostensibly harmed by the offense, by mail or by advertising in designated areas or by designated media or otherwise.

[§ 3007 Special Sanction for Organizations.

When an organization is convicted of an offense, the court may require the organization to give appropriate publicity to the conviction by notice to the class or classes of persons or sector of the public interested in or affected by the conviction, by advertising in designated areas or by designated media or otherwise.]

[§ 3007 Special Sanction for Organizations.

(1) *Eligibility*.—A person who has been convicted of a federal offense may be sentenced to probation or unconditional discharge as provided in this Chapter.

(2) *Criteria*.—The court shall not impose a sentence of imprisonment upon a person unless, having regard to the nature and circumstances of the offense and to the history and character of the defendant, it is satisfied that imprisonment is the more appropriate sentence for the protection of the public because:

(a) There is undue risk that during a period of probation the defendant will commit another crime;

(b) The defendant is in need of correctional treatment that can most effectively be provided by a sentence to imprisonment under Chapter 32; or

(c) A sentence to probation or unconditional discharge will unduly depreciate the seriousness of the defendant's crime, or undermine respect for law.

(3) *Factors to be Considered*.—The following factors, or the converse thereof where appropriate, while not controlling the discretion of the court, shall be accorded weight in making determinations called for by subsection (2):

(a) The defendant's criminal conduct neither caused nor threatened serious harm to another person or his property;

(b) The defendant did not plan or expect that his criminal conduct would cause or threaten serious harm to another person or his property;

(c) The defendant acted under strong provocation;

(d) There were substantial grounds which, though insufficient to establish a legal defense, tend to excuse or justify the defendant's conduct;

(e) The victim of the defendant's conduct induced or facilitated its commission;

(f) The defendant has made or will make restitution or reparation to the victim of his conduct for the damage or injury which was sustained;

(g) The defendant has no history of prior delinquency or criminal activity, or has led a law-abiding life for a substantial period of time before the commission of the present offense;

(h) The defendant's conduct was the result of circumstances unlikely to recur;

(i) The character, history and attitudes of the defendant indicate that he is unlikely to commit another crime;

(j) The defendant is particularly likely to respond affirmatively to probationary treatment;

(k) The imprisonment of the defendant would entail undue hardship to himself or his dependents;

(l) The defendant is elderly or in poor health;

(m) The defendant did not abuse a public position of responsibility or trust; and

(n) The defendant cooperated with law enforcement authorities by bringing other offenders to justice, or otherwise. Nothing herein shall be deemed to require explicitly reference to those factors in a presentence report or by the court at sentencing.

3201. Sentence of Imprisonment: Incidents.

(1) *Authorized Terms.*—The authorized terms of imprisonment are:

(a) For a Class A felony, no more than 30 years;

(b) For a Class B felony, no more than 15 years;

(c) For a Class C felony, no more than 7 years;

(d) For a Class A misdemeanor, no more than 1 year [6 months];

(e) For a Class B misdemeanor, no more than 30 days.

Such terms shall be administered as provided in Part C of this Code.

(2) *Components of Maximum Term for Indefinite Sentence.*—A sentence of imprisonment of more than six months shall be an indefinite sentence. The maximum term of every indefinite sentence imposed by the court shall include a prison component and a parole component. The parole component of such maximum term shall be (i) one-third for terms of nine years or less; (ii) three years for terms between nine and fifteen years, and (iii) five years for terms more than fifteen years; and the prison component shall be the remainder of such maximum term. If, however, the parole component so computed is less than three years, the court may increase it up to three years.

(3) *Minimum Term.*—An indefinite sentence for a Class A or B felony shall have no minimum term unless by the affirmative action of the court a term is set at no more than one-third of the prison component actually imposed. No other indefinite sentence shall have a minimum term. The court shall not impose a minimum term unless, having regard to the nature and circumstances of the offense and the history and character of the defendant, it is of the opinion that such a term is required because of the exceptional features of the case, such as warrant imposition of a term in the upper range under section 3202. The court shall set forth its reasons in detail. Except in the most extraordinary cases, the court shall obtain both a presentence report and a report from the Bureau of Corrections under section 3004 before imposing a minimum term.

(4) *Minimum Term; Alternative; Further Powers.*—In lieu of imposing a minimum term, the court may make a recommendation to the Board of Parole as to when the defendant should first be considered for parole. The court shall not recommend a parole eligibility date which is beyond the time when the court could have fixed a minimum term under subsection (3). The court shall have the authority to reduce an imposed minimum term to time served upon motion of the Bureau of Corrections made at any time, upon notice to the United States Attorney.

3502. Disqualification From Exercising Organization Functions.

An executive officer or other manager of an organization convicted of an offense committed in furtherance of the affairs of the organization may, as part of the sentence, be disqualified from exercising similar functions in the same or other organizations for a period not exceeding five years, if the court finds the scope or willfulness of his illegal actions make it dangerous for such functions to be entrusted to him.

Senator HRUSKA. The committee will stand in recess subject to the call of the Chair.

[Whereupon, at 12:05 p.m., the committee was recessed until the call of the Chair.]



REFORM OF FEDERAL CRIMINAL LAWS

WEDNESDAY, MAY 23, 1973

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:10 a.m., in Room 2228, Dirksen Senate Office Building, Senator Roman L. Hruska, presiding.

Present: Senator Hruska (residing).

Also present: G. Robert Blakey, chief counsel; Paul C. Summitt, deputy chief counsel; Dennis C. Thelen, assistant counsel; Kenneth A. Lazarus, minority counsel; and Mable A. Downey, clerk.

Senator HRUSKA. The subcommittee will come to order.

The Chairman, the Senator from Arkansas, is busy chairing another committee. He asked me to take charge of this hearing this morning.

Our first witness, the Honorable Marvin Frankel, U.S. District Court Judge, is not here yet. We will therefore call on Mr. Kenneth De Shelter, Director of Insurance of the State of Ohio.

We welcome you here, Mr. De Shelter.

Mr. DE SHELTER. Thank you, Senator Hruska.

Senator HRUSKA. You have submitted a statement to the committee. You may read it or highlight it, as you wish.

Mr. DE SHELTER. Thank you.

STATEMENT OF KENNETH DeSHELTER, DIRECTOR OF INSURANCE OF THE STATE OF OHIO

Mr. DE SHELTER. Mr. Chairman and members of the subcommittee, I am Kenneth De Shelter. I am the Director of Insurance of the State of Ohio.

I appear before the subcommittee today on behalf of the National Association of Insurance Commissioners, an organization commonly referred to as the NAIC, as chairman of the NAIC Subcommittee on Property and Liability Guaranty Funds.

Having its inception in and regular meetings since 1871, the NAIC is the oldest voluntary association of State officials. It includes the principal insurance regulatory authorities of the 50 States, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands.

We appreciate the opportunity to appear before the subcommittee during its consideration of legislation to revise the Federal Criminal Code. My comments will be directed entirely toward section 2-8F1 of S. 1 as it applies to the transfer or concealment of property in contemplation of a State insolvency proceeding.

ROLE OF THE NAIC IN INSURANCE REGULATION

To facilitate a better understanding of the NAIC suggestions, it would probably be helpful to provide some background on the organization, the relationship of insurance companies to the bankruptcy code, and current efforts of the States to deal with insolvencies and criminal activities which are related thereto.

As I noted previously, the NAIC was organized in 1871 and has met regularly since. Among the major objectives of the organization are: The promotion of uniformity in legislation affecting insurance; the encouragement of uniformity in departmental rulings on the insurance laws of the several States; the dissemination of information of value to insurance supervisory officials in the performance of their duties; and the establishment of means to fully protect the interests of insurance policyholders. With respect to uniformity, an important objective is to blend an appropriate degree of uniformity in State insurance regulation with variations to accommodate local needs and problems.

I would point out three specific examples of how the NAIC carries out its work of advancing the objectives just mentioned. These would be the procedures established through the NAIC for the conduct of examinations of insurance companies for the preparation of the annual statement blanks submitted by all insurers, and for the valuation of securities held by all insurers to assure that a uniform value is accepted by each jurisdiction for purposes of determining financial status.

Before discussing the desirability of a statute creating a Federal crime for the transfer or concealment of assets in contemplation of a State insolvency proceeding, I should perhaps note the distinction between the objectives of a Federal bankruptcy proceeding and a State insurance company insolvency proceeding. Unlike a personal or corporate bankruptcy where the assets are placed in the hands of a court for the protection of the creditors and to relieve the bankrupt from oppressive indebtedness, a State insurance company insolvency proceeding has as its primary objective the conservation of an insurer's assets for the benefit of its policyholders. These policyholders are not "creditors" in the general sense of the term. In an insurer insolvency, the "creditors" in the business sense make but limited demands on assets of a corporation in comparison with anticipated claims based on insured losses. In many States those demands are treated as secondary to policyholder claims.

The States have adopted liquidation and rehabilitation acts to provide a mechanism tailored for the protection of policyholders. In 1969 the NAIC adopted a model Insurers Rehabilitation and Liquidation Act for which my subcommittee is presently developing some refinements.

The problem of insurer insolvency has always been recognized as a major challenge to the skills of State insurance regulatory agencies. The public interest requires that an insurer be capable of making payment when an insured suffers a covered loss. On the other hand, an iron-clad guarantee against insolvency would probably make entry into the insurance business by new companies impossible.

In recent years, the States have moved rapidly through the mechanism of the NAIC to protect policyholders while at the same time not unreasonably limiting access to the insurance business. For example, in December 1969, the NAIC adopted a model State guarantee fund bill for property and liability insurers. To date, 46 States have enacted some type of guaranty fund legislation, most of which is patterned after the NAIC model bill. On the life and health side, the NAIC adopted a Model Guaranty Fund Act in December 1970. So far, nine States have enacted this type of law. I expect to see more States adopting similar legislation in the near future so as to provide comparable protection to that given property and liability policyholders.

To lessen the risk of insolvencies the NAIC is developing and implementing a statistical analysis program, the objective of which is to give State regulatory agencies an early warning of possible financial difficulty facing an insurer. Under this program, a series of computerized tests are run on statistics derived from insurance company annual statements. The failure of an insurer to pass several of the tests puts the State regulatory authority on notice and permits remedial action to be taken without delay. The system for property liability companies was first operated in 1972 providing a review of 1971 reports. The life and health program is being inaugurated this year for 1972 reports. As more experience is gained with the statistical reporting program, the tests will be modified to increase their reliability.

I should also mention a study of the examination system which is to be considered by the NAIC at its upcoming June meetings here in Washington. The current proposal provides for an in-depth study of the State examination system to review the present procedural aspects of an examination and to determine what changes can be implemented to increase its effectiveness in the light of modern corporate accounting practices.

With the insolvency funds, the early warning testing system, and any revisions in the examination system which might be forthcoming from the examination study, losses borne by the public as a result of insurer insolvencies should be greatly reduced.

To assure compliance with State insurance laws, State insurance regulatory authorities are given a wide range of powers. In some jurisdictions, the regulatory agency has the authority to dispose of all enforcement problems through its own office. In other jurisdictions, the commissioner calls upon the State attorney general for certain legal proceedings.

Some of the enforcement tools at the hands of insurance regulators include seizures, examinations, criminal and civil penalties,

revocation of license, liquidation and rehabilitation, cease and desist summary orders, and injunctions.

Turning to the specific problem of insolvency fraud, few State insurance or criminal codes have statutes paralleling the Federal crime of bankruptcy fraud. Insurance statutes are primarily concerned with protecting the policyholder and not with punishing a wrongdoer. For example, the NAIC Model Rehabilitation and Liquidation Act provides for the recovery of assets of an insurer which have been fraudulently transferred but does not specifically provide criminal penalties. Of course, most insurance laws have general penalty provisions for violations of the insurance law, but these are not designed to effectively deter major fraud schemes. Most will provide for a fine of up to \$1,000 and for imprisonment of up to 1 year.

An individual who has allegedly transferred or concealed insurance company property will usually be tried under a State's general theft statute. As a matter of fact, the State statutes generally provide penalties comparable to those under the present Federal criminal code for bankruptcy fraud. The Federal penalty now provides for a fine of up to \$5,000 and imprisonment for up to 5 years. As examples of State penalties, under applicable larceny and theft statutes, sanctions of up to 10 years imprisonment are possible in the District of Columbia and 15 years imprisonment and \$10,000 fine in Wisconsin.

The desirability of a State statute applicable to the specific crime of insolvency fraud is recognized, however, by Senate insurance regulatory authorities and steps are under way within the NAIC to change the situation. At the December, 1972 meeting of the NAIC, the Subcommittee on Property and Liability Guaranty Funds appointed a task force to consider a model bill imposing criminal sanctions upon those responsible for an insurer's insolvency. This task force is expected to submit its recommendations at the June NAIC meeting.

In essence, the current draft of the model bill would establish a criminal penalty for: (1) the failure of an insurance company officer or director to act to notify the insurance regulatory agency when the insurer becomes financially impaired; and (2) the transfer or concealment of assets in contemplation of a State insolvency proceeding.

The notification provision is drawn from provisions currently in the English law. It is designed to utilize the knowledge of insiders to better enable the insurance commissioners to ascertain pending problems before an insurer becomes insolvent. Failure of officers and directors to comply subjects them to a fine of up to \$50,000 and imprisonment for 1 year. The transfer or concealment provision provides a penalty of imprisonment for up to 5 years.

Thus, it appears that our task force and subcommittee may both recommend quite similar sanctions. This being the case, the question arises, is it necessary to have both a State and Federal penalty? It should be observed that the proposed Federal legislation would apply only when the offense is committed within the commerce jurisdiction of the Federal Government. State sanctions would continue as the only remedy in instances involving no movement across State or U.S. boundaries or the use of a transportation, communication or power facility of interstate or foreign commerce.

Assuming that the States adopt the final product of the NAIC task force, and the legislative record of NAIC model bills has been good, there are grounds to support a Federal enactment as well. The mere existence of a Federal penalty should have a salutary deterrent effect. Furthermore, the existence of a Federal alternative would permit the utilization of the FBI to participate in the capture of persons crossing State lines to avoid apprehension. Although the extradition mechanism is available, interstate efforts may be less efficient than those of Federal enforcement agencies.

In summary, I would say that the State insurance regulation has developed over a long period of time and has been directed principally toward assuring a sound and equitable mechanism for the protection of the public. Insofar as insurer financial stability is concerned, primary concern has been directed at solvency rather than deterring criminal conduct aimed at insurance company assets.

Where criminal activity has occurred, principal reliance has been placed on States criminal theft statutes rather than provisions of the insurance codes. However, to increase the deterrent effect of existing States criminal laws, the NAIC is developing a statute specifically directed at insurance company insolvency.

To the extent that a similar Federal statute would contribute to increasing the deterrence and would expedite the apprehension of fugitives, the NAIC would support its enactment.

Senator HRUSKA. Thank you Mr. De Shelter.

You have stated that in 1969 the NAIC adopted a Model Insurers Rehabilitation and Liquidation Act. Has that been promulgated yet?

Has any State considered its enactment?

Mr. DE SHELTER. Yes. I think a number of States have the bill already in effect. I don't know the number of States, but I do know that it is in effect and has been implemented in certain cases.

Senator HRUSKA. Your Committee is working, you say, on further refinements and alterations, but basically, of course, the States have acted on the basis of what you have developed to date, is that the idea?

Mr. DE SHELTER. That's correct. And some of the refinements we are concerned with, Senator, are the methods by which insurers could ultimately recoup any money that was paid out through the post assessment process.

We are contemplating the process of recoupment so that the industry ultimately can redistribute the losses that are paid or effectively pick them up in a subsequent rating procedure, and we are trying to devise a formula which is equitable to the public as well as to the insurer.

Senator HRUSKA. Thank you for a very informative statement. Mr. Blakey, do you have any questions?

Mr. BLAKEY. I have only one. Commissioner, could you give the subcommittee some idea of the time frame within which your task force is operating to develop the model State criminal penalties?

Mr. DE SHELTER. We have a bill in final draft form now, Mr. Blakey, and we'll meet the first week in June and we propose to have our proposed draft acted upon by the executive committee and by the plenary session of the NAIC, and hopefully by mid-June we ought to be able to distribute that to the States for enactment in the different legislatures.

MR. BLAKEY. Could you arrange to have a copy of that made available to the subcommittee?

MR. DE SHELTER. I can give you a copy, bearing in mind the fact that it is a draft copy. I would be glad to submit that to you at this time.

MR. BLAKEY. I have in mind that it might be of some assistance to us in drafting State insolvency aspects of the Federal bankruptcy primer.

MR. DE SHELTER. We think it is very important. In the very nature of the insolvency problems, the insurers who are in the most difficulty will attempt to conceal that fact from the regulators, so we want to make it a crime to conceal that fact from the regulators and therefore insist upon notification. In the process of ferreting these matters out it has come to our attention in the past, many times the chief executive officers of an insurance company may say to an accountant who is responsible to the chief executive officer when he submitted this statement, I don't like that financial picture. You go back and rework that statement.

It occurs to us that if we would give some immunity from prosecution to some of these accountants and CPA's working for the insurers, that we would be able to find instances in which the chief executive officer subverted the actual financial picture of the company to the detriment of the policyholders, and we think it is critical to get that kind of requirement on all of the officers and trustees. We have as part of it that the directors or officers or an employee, when it comes to his attention that the company is impaired, must relate that fact to the chief executive officer and the chief executive officer must relate that to the regulator. It does not necessarily mean that they would be put into reorganization or liquidation. At least the regulator has an opportunity at the earliest possible date to see that there is danger there and to watch that company's progress.

MR. BLAKEY. Have the Commissioners found any indication that, shall I call it, professional looters or members of organized crime have operated to take the basic valuable assets of some insurance companies and substitute for them worthless or even stolen stock?

MR. DE SHELTER. No question about that, Mr. Blakey.

I would not say there is a hard and fast connection with organized crime as such, but it is pretty well organized by certain known individuals and sometimes unknown individuals who do in effect just what you say. They tend to buy into companies that are having trouble and drain off, either through a holding company system or management arrangements, try to drain off good assets or try to exchange them or buy and sell them.

MR. BLAKEY. Where you're dealing with that sort of a national syndicate, do you think the investigative resources of the average State are capable of handling it?

MR. DE SHELTER. Well, the investigative resources of the average State are, in point of fact, in some instances extremely good, immensely capable people. That is not to say that the level of investigative powers in the average State is comparable.

In a general sense I would not say that if a transaction took place in several States and perhaps in the Bahamas or some foreign coun-

tries, that it would be easy for any State regulatory agency to follow that pattern out and investigate it completely as it would be for a Federal agency. That would be easier. However, there has developed a very high degree of expertise in examination in the State regulatory agencies, so the extent to which they cooperate immensely helps our people in regulation, examination and audit. They mete out some incredible information which is not usually got.

Mr. BLAKEY. Would you see any difficulties in cooperation between State insurance people and such Federal investigative agencies as the FBI in pursuing Bahama leads and things of that sort?

Mr. DE SHELTER. I would not think so. In fact, we do business with them now, with Internal Revenue on a number of matters that come in, and try to cooperate.

I am not always convinced we get as much cooperation from them as we like, but that is a tradition, I think.

Mr. BLAKEY. There is limited mail fraud jurisdiction in the Postal Service now dealing with insurance frauds. Has that been successful?

Mr. DE SHELTER. I am not sure the extent to which mail fraud on the Federal level has been effective. I think there are, in point of fact, a number of other State statutes available for prosecution of larceny and property under false pretenses and statutes such as that, but I kind of go on the theory that the extent to which you have sufficiently more options available it gives you an opportunity to apprehend more people involved in this kind of skulduggery.

Mr. BLAKEY. Thank you, commissioner.

Senator HRUSKA. How rapidly can these computerized tests that you have used in property liability companies, be done, Mr. Commissioner?

Mr. DE SHELTER. They are done within a matter of months after the company statement is filed, Senator, and they are effectively a profile. They'd be much like checking a person's vital signs, a human's vital signs. It gives you certain ratios of the capital and surplus and so on. It gives you certain indicators about the claims, reserves, etc., the kind of indicators which red flag a situation where you may be having a solvency problem coming up.

However, I might suggest to you that that information again is supplied basically by the company and is only as good as the men who supply that information, which points up the need to compel these people to supply accurate information.

Senator HRUSKA. Getting back to the time element, when are those annual reports due?

Mr. DE SHELTER. By March 1.

Senator HRUSKA. By March 1. And it wouldn't of course, be the equivalent of an examination. But there are certain things, for example the evaluation of securities, that are readily done by computer now, aren't there?

Mr. DE SHELTER. Right. We audit all of our statements, and, as they come in, we go over them very quickly with close examinations. And we have specific companies, of course, which we'll be watching. We'll do those first as a priority matter.

If a company appears to be in any kind of difficulty, we change their accounting requirements to make them report perhaps every

quarter or even monthly in some instances, and we then put examiners in their company to watch what is going on. The time lag is not bad there, although you do have the essential problem that if people are going to be dishonest, falsifying a statement is just one more dishonest act.

Senator HRUSKA. Mr. Lazarus, do you have any questions?

Mr. LAZARUS. No, thank you, Mr. Chairman.

Senator HRUSKA. Thank you very much, Mr. De Shelter. We will follow your Association's work with great interest.

Mr. DE SHELTER. Thank you.

Senator HRUSKA. And we wish you much luck in further development of your plans.

Mr. DE SHELTER. Thank you.

Senator HRUSKA. Our next witness will be Mr. Donald McDonald, chairman of the Section of Taxation of the American Bar Association, and he will testify on the tax laws that are treated within S. 1 and S. 1400.

STATEMENT OF DONALD McDONALD, CHAIRMAN, SECTION OF TAXATION, AMERICAN BAR ASSOCIATION; ACCOMPANIED BY JAMES Q. QUIGGLE, SECRETARY, TAXATION SECTION, AMERICAN BAR ASSOCIATION, AND JOHN BRAY, MEMBER OF SPECIAL SUBCOMMITTEE ON FEDERAL CRIMINAL CODE, AMERICAN BAR ASSOCIATION

Mr. McDONALD. Thank you very much, Senator. I have with me this morning on my right, James Q. Quiggle, secretary of the Taxation Section of the American Bar Association and council director for our Committee on Civil and Criminal Penalties.

On my left I have with me Jack Bray of Washington, D.C., who is a member of the Special Subcommittee on the Federal Criminal Code.

I myself am Donald McDonald. I am an attorney admitted to practice in Pennsylvania. I am currently practicing in Philadelphia.

As chairman of the Section of Taxation we represent about 14,600 attorneys. We are continually concerned with any improvement or change in the elements of tax offenses, in an effort to make our self-assessment system work better.

Preliminarily, one of our main problems arises from the fact that the mere difference of opinion in the amount of tax due between a revenue agent and a taxpayer is by no means a crime. Recently a test of tax practitioners showed that five or six of them came up with different answers on the same facts. A test of Revenue agents disclosed the same differences.

So that, therefore, in defining a tax crime the mere understatement of tax is insufficient to prove an element of criminality.

We also want to commend the cooperation we have received from this subcommittee and from the members of your staff, the several conferences we've had with Mr. Blakey. We have a great deal of praise for the care and thought that has gone into this massive project of codifying and simplifying the Federal criminal law.

Senator HRUSKA. Mr. McDonald, you have furnished us a statement which will be put in the record in its entirety. If you wish to highlight it, that would be very welcome.
[The statement referred to follows:]

STATEMENT OF THE SECTION OF TAXATION OF THE AMERICAN BAR
ASSOCIATION ON S. 1 AND S. 1400

(The Proposed Federal Criminal Code)

Mr. Chairman and Members of the Subcommittee:

My name is Donald McDonald. I am an attorney practicing in Philadelphia and am presently Chairman of the Section of Taxation of the American Bar Association. Our Section, with a membership of over 14,000 attorneys concerned with the scope and application of our federal tax laws including the penal sanctions applicable in the tax area, also has an active liaison with other Sections of the Association, other professional groups and academic institutions.

Our continuing concern with any change in the elements and the reach of tax offenses which might result in a radical departure from the presently well understood standards has led us to appear before this Subcommittee since the introduction of S. 1 and S. 1400 as we did, through then Chairman Mac Asbill, Jr., on March 16, 1972, during the hearings on the proposals of the National Commission on Reform of Federal Criminal Laws (hereinafter, "Brown Commission"). I wish to record now, as did Mr. Asbill, the general endorsement of the House of Delegates of the American Bar Association the salutary aims of simplification and regeneration of the federal criminal system which we take to be the underlying impetus of the movement for a new code. I wish to add that the members of the Section who have had the privilege of conferring with Mr. G. Robert Blakey and other members of the staff of this Subcommittee have only praise for the high degree of care, competence and concern of those working with you on this project.

The Section of Taxation, its Committee on Civil and Criminal Tax Penalties, and the officers and individual members who have commented upon the proposed legislation have endeavored to do so objectively. While the Section is composed principally of private practitioners, we have avoided adopting a defense counsel orientation. Our professional responsibility and representation, encompassing, as it does, federal taxation, concerns laws to which virtually every citizen is subject. Thus, perhaps uniquely in our field, "justice to the individual and justice to the society as a whole"¹ are one and the same interest.

Before beginning our analysis of the provisions of S. 1 and S. 1400, I would like to reiterate our general concern over the transfer of the criminal tax provisions from Title 26 to Title 18.² It appears to us that the law of federal tax crimes may be *sui generis*. For example, "criminal attempt" in tax crimes has an entirely different meaning from "attempt" as it applies to crimes of another nature. The provision of common definitions applicable to all crimes may radically distort the nature of tax crimes as they are now defined. The result of any merger of tax crimes with others in Title 18 may result in the nullification of decades of worthwhile law on the subject and a destruction of the present careful integration in Title 26 of tax crimes with civil penalties.

Our analysis and our comments follow the basic division that both Bills reflect as to tax offenses. S. 1 and S. 1400 contain two detailed provisions describing tax offenses. In each bill the traditional felony of tax evasion is treated in a provision which lists five specific methods of tax evasion, followed by a general "catch-all" provision.

Each of the proposed Bills then contains a separate provision dealing with those tax offenses that have traditionally been less serious misdemeanor offenses—chiefly the offense of failure to file a tax return.

Before dealing with tax evasion offenses and failure to file offenses as drawn in each of the Bills, we note that there are important differences between S. 1 and S. 1400.

¹ See statement of Senator Hruska, 119 Congressional Record No. 47, pp. 3-4 (3/27/73).

² See statement of Mr. Asbill, pp. 2-7.

First, S. 1 grades the offense of tax evasion in such a way that the class of felony, and therefore the amount of punishment, ascends in degree as the evasion-related liability increases. By contrast all evasion offenses in S. 1400 are Class D felonies.

Another major difference in treatment is that the traditional misdemeanor offenses—principally failure to file a return—are raised to the status of a felony in S. 1 although the period of imprisonment for such offenses remains substantially the same as for the present misdemeanor of failure to file.

I. THE OFFENSE OF TAX EVASION

Elimination of the Willfulness Requirement

Both S. 1 and S. 1400 substitute the phrase “with intent to evade” for the present law’s “willfully” as the standard of culpability for the felony of tax evasion.

The willfulness needed for present tax evasion has been the subject of extensive teaching by the Supreme Court in *Spies v. United States*.³ Referring to the willfulness that is required for the felony of tax evasion, the Court said that willingness should include “some element of evil motive and want of justification” (317 U.S. at 498) and that an affirmative willful attempt may be inferred from such active conduct as keeping double sets of books, making false entries, or other affirmative acts of concealment. Clearly, willfulness under present law is a very substantial standard of culpability. Thanks to a wealth of judicial decisions, the uncertainty this Committee might fear is inherent in the word “willingness” has long ago been largely eliminated in the tax offense area.

The Bills before this Committee would eliminate “willfulness” as we now know it and cause the courts to experiment with a new phrase—“with intent to evade.”⁴ This proposed standard of culpability for tax evasion falls far short of the requirements of “willfulness.” “With intent to evade” is defined to mean having “a conscious objective to engage in the conduct and to cause [the] result.” (S. 1, § 2-6G1(c) (1); see also S. 1400, § 302(a)).

There is a danger inherent in the language employed in S. 1 (2-6G1) and S. 1400 (§ 1401) that the “intent” requirement will be construed to apply only to the evasion motive alone and not to the acts specified in the subsection of S. 1 (§ 2-6G1) and S. 1400 (§ 1401). Such a misinterpretation could be reinforced by the definition of “intentionally” in terms of result.⁵ A court might hold the “result” specified in the evasion section is evasion of tax or payment. The Court would then hold that there was no element of culpability as to the conduct alleged, such as understatement of tax. Under such a construction it would be possible to secure a conviction for tax evasion through proof of a general intent to evade, accompanied by proof that an income tax return was shown through later audit to have understated the tax, without regard to whether or not the taxpayer intended to submit a false return or, indeed, even knew that he had.⁶ In view of the statement of Professor Duke⁷ it is not believed that the draftsmen of any of the proposed codes intended such a result which the language unfortunately invites.

The prior testimony of the Section of Taxation urged retention of the willfulness requirement intact.⁸ It would go a long way to resolving the problems that the Section envisions for the tax offense sections of the proposed criminal code if the word “willfully” were inserted in each such section with a legislative declaration that no change is intended from existing law. If the objection were raised that this would be a departure from one of the aims of codification (that is, to apply the same definitions of culpability to most of the major offenses), we would most respectfully submit that the aim of codification—clarity—is not served by recasting a particular series of well understood of-

³ 317 U.S. 492 (1943).

⁴ The attempt in S. 1 and S. 1400 to provide a culpability standard for tax offenses having unique applicability to the tax offenses is a clear acknowledgment that the culpability required for tax evasion is now and should continue to be unique.

⁵ S. 1, § 1-1A; S. 1400, § 302(a).

⁶ Evidence of faulty or incomplete business records might be used as evidence of “intent to evade” even though no deficiency of business income was proven. Inadvertent omission of a spouse’s interest income, for example, would supply the deficiency. Under present law the omission of the interest would have to be the willful attempt.

⁷ “While not employing the word ‘willfully,’ the Draft in requiring ‘intent to evade’ does not alter the *mens rea* of tax evasion.” Working Papers, pp. 74-749.

⁸ See statement of Mr. Asbill, pp. 13-18.

fenses such as tax offenses in terms of culpability which are not only different but recognized to be inapplicable. A further aim of codification—reform—is not served merely by change, particularly when the change will require a fresh start through abundant litigation in an area that is now fairly well understood, has been much canvassed, and is currently satisfactorily serving the purpose for which it was designed.

Substantial Deficiency

In contrast to the express language of S. 1400, the requirement of a substantial tax deficiency or liability is specifically incorporated in S. 1 (§2-6G1(b)). This seems wise, since it provides a *locus poenitentiae*, prevents unjust conviction on the margin of error inherent in hypothetical methods of reconstructing income found in bank deposit, net worth, and expenditure cases, and really is what tax evasion means.⁹

The limitation of the tax element to evasion-related items in S. 1 (§2-6G1(b)) is also just, for it prevents the basing of a prosecution on technical adjustments to depreciation, inventory valuation, amount of loss recognizable in a particular year, and the like, which may be large in amount but do not usually bear importantly on the element of intent or the gravity of the offense.

The elimination of the requirement of substantiality from the evasion offense in S. 1400 (§ 1401) is open to grave question for the same reasons that warrant that requirement in S. 1 and that have led the courts to construe that element as an element of the present statute. To allow a conviction for tax evasion when there is no deficiency or liability, as was specifically contemplated under the Brown Commission Report and may be possible, at least on its face, under S. 1400, is not only a direct departure from present law, it is contrary not only to professional understanding but also, we submit, to the understanding of the general public. If there is no tax due, there is no tax evasion.¹⁰ That the problem is not solved by downgrading the offense in no deficiency cases was recognized by the draftsmen of S. 1400 by omitting grading from that Bill.

It is particularly anomalous for S. 1400, which does not grade evasion by the amount of tax, to carry forward (in §1403(b)) a definition from S. 1 (in §2-6A1(10)) of tax which includes "any penalty . . . or interest". The civil penalty uniformly asserted in evasion cases is the 50% fraud penalty.¹¹ The only reason to include the civil fraud penalty as tax in a criminal evasion case would be to allow the prosecution to prejudice the defendant before the trier of fact by including a fraud penalty in the indictment and/or by adducing testimony as to the nature and amount of the penalty. It is suggested that the part of the definition of tax in S. 1 and S. 1400 which includes "any penalty, addition to, tax, additional amount, or interest thereon" be omitted. In addition to the prejudice this would inject into the trial of any case, the inclusion of such items under a grading system based on the amount of tax as in S. 1 would allow the imposition of more severe sentences based on no additional criminal conduct of the taxpayers. If substantiality were an element under S. 1400, under that statute as well as S. 1 the automatic addition of penalty and interest could well inflate a deficiency into substantiality. Not only would such a statutory scheme raise serious due process questions, it also might result in double jeopardy since a taxpayer would be eligible for more severe punishment, financial as well as incarceration, based on the very penalty which is at present a civil sanction. The inclusion of penalty and interest in "tax" is also contrary to the logic of the offense of evasion. A taxpayer who files a false and fraudulent return does not seek thereby to evade penalty and interest. Had the return been an honest one, there would be no penalty and interest, hence nothing to evade.

Problems of Grading Offenses

S. 1, like the Brown Commission Proposed Code¹², but unlike S. 1400, grades the evasion offense by gross amount of payment of tax evaded. Section 2-6G1(b) provides that evasion is a Class B felony if the evasion related lia-

⁹ See statement of Mr. Asbill, pp. 7-9.

¹⁰ There are many reasons, innocent so far as intended harm to the collection of the revenue is concerned, why a taxpayer may include false figures on his return, such as the reduction of income as well as an equal amount of deductions because of marital difficulties.

¹¹ 26 U.S.C. §6653(b).

¹² See statement of Mr. Asbill, pp. 9-13.

bility is \$100,000 or more, a Class C felony if the evasion related liability is \$10,000 or more, and a Class D felony if the evasion related liability is substantial but less than \$10,000.¹³

It is the position of the Section of Taxation that this type of grading for tax offenses is wholly unworkable for tax crimes and would in effect erode the essential deterrent of the present civil fraud penalty which it is evidently the legislative intent to continue.

A criminal tax case is tried to a jury of laymen, not a jury of tax experts. Juries are free to accept or reject any part of the evidence in a tax case as they are in any other criminal case. A grading system for tax offenses based on the liability would require the jury to decide the exact amount of the "evasion-related liability." A special verdict would be needed in every case in order to classify the offense for sentencing purposes. Fundamental fairness would require either that the jury make special findings of fact and receive additional expert opinion evidence and instructions from the court as to the application of the provisions of the Internal Revenue Code to their findings of fact or to state in their verdict the basis for their determination of the amount of the tax liability, or, perhaps, both. This will create, if enacted, great practical difficulty in the conduct of criminal tax trials. Even in civil tax trials in which the goal is determination of the taxpayer's exact tax liability, the technical calculations are almost never submitted to the jury, but await a court or jury ruling on the factual and legal questions pertinent to the amount of liability. However, the jury would, under S. 1, be called upon to render an exact verdict on the amount of liability in order to convict for the proper category of offense. Such a procedure may prove impossible in practice. Also, in every case there would be a vast potential for over-turning a verdict because it result from an erroneous application by the jury of often complex applications of the Internal Revenue Code.

It would obviously be basically unfair to allow a jury to return a general finding of an up-graded felony which was based on their unrevealed ignorance of the principles and applications of the tax law.

It is respectfully submitted that prompt and certain enforcement of criminal tax laws is impeded, not enhanced, by the conversion of a tax evasion trial into a proceeding far more lengthy and complex than would be required in the civil trial of the issues before the United States Tax Court. This would result, *inter alia*, from the necessity of placing before the jury every possible alternative application of the various sections of the Internal Revenue Code to all the variable findings of fact that they might make. This would seem to be unfair to the prosecution as well as to the defense. On the prosecution side the jury's attention would almost inevitably be diverted from the criminal nature of the acts charged. On the defense side, the jury would easily lose sight of such fundamental principles as reasonable doubt in their attempt to function as tax computers.

Possibly one of the considerations that modified the inclusion of grading as part of the tax evasion offense was the feeling that it was unfair and unwise to subject someone to the same scale of penalties who has evaded a reasonably small amount of tax as may be imposed on a defendant in a relatively large case. To the extent that the penalty sections of the Internal Revenue Code have historically been used to prosecute people thought to have organized crime connections or to have been involved in the corruption of public officials, special treatment is not required by grading of tax offenses since such defendants may be subjected to more severe penalties under the Dangerous Special Offender section of S. 1 (1-4D2). It is also not correct to assume that under present law someone who is convicted of evading \$1,000 in tax is subject to the same penalties as someone who is convicted of evading \$100,000 in tax. The 50% civil fraud penalty, which now in several circuits automatically applies upon conviction of tax evasion, would be \$500 in the first case and

¹³ The grading of offenses under S. 1 would raise the present maximum fine for tax evasion from \$10,000 per count to a maximum of \$1,095,000 per count (§1-4C1(a) of S. 1; §§7201 and 7202 I.R.C. of 1954). The prison term under S. 1 for each count for evasion of a tax liability of \$100,000 or more would be 10 or 20 years (Class B felony). The majority of tax evasion cases would likely fall into the Class C felony category which covers evasion related liabilities of \$10,000 or more. The jail term per count would be from five to 10 years as compared to the five year per count maximum term under present law. (§2-6G1(b)(2); §1-4B1(a)). The maximum fine for a Class C or D felony would be \$547,500 per count. (§2-6G1(b)(3)).

\$50,000 in the second case.¹⁴ In addition, present Internal Revenue Service policy of not seeking a civil tax determination and civil penalties until after the completion of a criminal case is expected to continue. This very often results in a situation where the six percent interest figure often approaches and exceeds 100% of the basic tax liability. Under such ordinary circumstances, therefore, the \$100,000 evader is punished by the civil penalty of \$50,000 and \$100,000 or more of interest-all in addition to the \$100,000 tax.

Therefore, the Section urges the approach of S. 1400 which continues present law by establishing a single grade for the offense of tax evasion.¹⁵

Affirmative Acts of Evasion

By the specification of the actual prohibited conduct for the offense of evasion, certain portions of the evasion offense, S. 1 (§§2-6G1(a)(i), (ii) and (iv)) and S. 1400 (1401(a)(1),¹⁶ (2), (4) and (6)) possibly require as an element some active conduct. However, S. 1 (§§2-6G1(a)(iii), (v) and (vi)) and S. 1400 (1401(a)(3) and (5)),¹⁷ at least on their face, would seem to allow conviction of the most serious offense under the Internal Revenue laws on proof of mere passive conduct or inaction, contrary to law settled for three decades¹⁸ and contrary to our policy against allowing a jury to brand a fellow citizen a felon on mere speculation as to his mental state.¹⁹

Both versions of the proposed Code depart from 26 U.S.C. §7201 by proscribing specific means of evasion. This approach fulfills to some extent the *desideratum* of specificity in criminal statutes. Yet each proposed Code recognizes the Congressional caution and wisdom of the present statute by including as a last subsection defining evasion a catch-all, more or less designed to be all encompassing, so that novel and ingenious attempts to defraud the revenue will not go unpunished. Unfortunately, each catch-all provision suffers from ambiguities, possibly of fatal vagueness, and may turn out to be self-defeating from the very fact that it combines the blanket approach of the present statute which has served so well with the specific criminal act type of drafting, new to the evasion offense. For instance, if the courts quite properly apply the rules of *ejusdem generis* and *noscitur a sociis* to the proposed evasion provisions, there seems to be a substantial risk that only conduct similar in type to that specified will be found to be reached by the statute.

S. 1 (§2-6G1(a)(6)) eliminates the problems arising from the use of the word "attempt" in the catch-all of §1401(1)(f) of Brown Commission Report pointed out at pages 5-7 of Mr. Asbill's statement²⁰ by substituting the word "seeks", while S. 1400 (§1401(a)(6)) approaches the same problem by using the term "acts". On balance "acts" seems preferable, for it continues the understanding under present law that what is made felonious is actual conduct accompanied by a state of mind, not a state of mind alone. "Seeks" on the other hand has a much broader meaning, including "look for", "search", and "consult".²¹ It would literally be within the terms of §2-6G1(a)(vi) of S. 1 for a taxpayer who has used honest and open means to achieve a tax result permissible under the Internal Revenue Code, if the jury speculated that, in his heart of hearts, the taxpayer was really seeking to evade taxes.

Failure to File as Evasion

All three proposed Codes have overlapping provisions allowing failure to file returns to be prosecuted either as the most serious tax felony, tax evasion, or the lesser offense, disregard of a tax obligation.²² This is a departure from

¹⁴ See Working Papers, p. 753.

¹⁵ The Section, however, opposes the increase in penalties in S. 1400 as unwarranted. See *infra*.

¹⁶ The phrasing is unfortunate in that it does not clearly provide that the proscribed understatement of the tax be the act of the accused. The use of the words "false return" in S. 1 or the common indictment language now employed—"false and fraudulent return" more certainly designates the criminal nature of the act proscribed.

¹⁷ And possibly §1401(a)(1). See previous footnote.

¹⁸ *Spies v. United States*, 317 U.S. 492 (1943).

¹⁹ The further problems arising from reducing or virtually eliminating the state of mind element of tax offenses is discussed *infra*.

²⁰ Does "attempt" have the special meaning it has acquired in the tax area (*Spies v. United States*, 317 U.S. at 498-9), or does it have the meaning which it has acquired in other areas of the criminal law?

²¹ *C.I.R. v. First Security Bank of Utah*, 92 S.Ct. 1085, 1089 n. 4 (1972).

²² S. 1 §§2-6G1(a)(v), 2-6G2(a)(1), S. 1400, §§1401(a)(5), 1402(a)(1); Brown Commission Report, §§1401(1)(e), 1402(a).

present law. In *Spies v. United States*, 317 U.S. 492 (1943), the Supreme Court held that the mere failure to file a tax return, even if done willfully, was not a sufficient basis for an evasion prosecution. Evasion, the Court stated, giving several examples, required an affirmative act of commission.

There is also the danger that every failure to file case would be prosecuted as evasion. The difference between the elements of failure to file as an evasion and as a disregarding of an obligation is more formal than real. In prosecutions for failure to file under the present statute, a misdemeanor under 26 U.S.C. §7203, the prosecutor regularly introduces evidence of the amount of tax allegedly due on the issue of intent even though Section 7203, like the disregard of obligations offense in the proposed Codes, does not require a tax due and owing as an element. Thus, the only distinction in the elements of the two proposed failure to file offenses is the culpability, "intent to evade" as against "knowingly". But such a distinction on merely a mental element, absent any distinction, as to an actual act apart from mere passive inaction, was what led the Supreme Court in *Spies* to reject prosecution of failure to file as an evasion.

A further problem from the failure to file offense would be to make the choice of penalty range the discretion of the prosecutor instead of the sentencing judge, a result disapproved by the Supreme Court in *Sansone v. United States*, 380 U.S. 343 (1965).

Since *Spies* there have been a few failure to file cases prosecuted as evasion, but in each case there has been the allegation of affirmative acts of evasion in addition to the failure to file. If it be thought necessary to include specifically failure to file as evasion, perhaps the provision may be saved in a similar manner, by providing that there must be a specific act of evasion in addition to the failure to file.

Reach of Statute—Returns—Declarations of Estimated Tax

Just what returns may be the subject of prosecution under the proposed Codes is not free from doubt. In §1401(1)(a) of the Brown Commission Report and S. 1 (§2-6G1(a)(i)), an information return may be the subject of an evasion charge if it is false as to a material matter. S. 1400 omits information returns from its parallel provision (1401(a)(1)); and would, seem to specifically exclude them from evasion treatment by excluding them from the definition of tax return (§1403(c)).²³ S. 1400 (§1401(a)(1)) specifically makes eligible for evasion treatment only a tax return which understates the tax.

S. 1 (§2-6G2(a)(i)) and the Brown Commission Report (§1402(a)) each omit information returns from failure-to-file disregard-of-tax obligation offense and explicitly exclude information returns from the definition of tax returns. (Brown Commission Report, §1409(e); S. 1, §2-6A1(11)). S. 1400 (1402(a)(1)) provides that failure to file an information return is criminal disregarding of a tax obligation. Thus, S. 1 and the Brown Commission Report make information returns only subject to evasion treatment only, whereas S. 1400 makes criminal only the failure to file such returns.

Among the returns that all proposed Codes intended to eliminate from criminal penalties are declarations of estimated tax.²⁴ This would continue the exemption of such returns which is explicitly now accomplished by an exclusion of such returns in the criminal statute itself.²⁵ The means adopted to achieve this however may fall short of the aim. S. 1 (§2-6A(11)), S. 1400 (§1403(c)), and Brown Commission Report (1409(e)) all employ the same technique: excluding returns of estimated tax as well as information returns and interim reports from the definition of "tax return". Yet the catch-all provision of the evasion offense in each proposed Code does not refer to tax returns so that estimated and other returns intended to be excluded from criminal sanction might be treated as a means of evasion, the most serious offense. There is also a risk that estimated tax and other excluded returns and reports might fall within the false statement sections of each proposed Code,²⁶

²³ There is a danger that information returns might be brought back in through the catch-all provision of S. 1400 (§1401(a)(6)), but the use of "otherwise" in that subsection suggests that acts of evasion prosecutable under the catch-all would be other than by a return.

²⁴ See Comment to Brown Commission Report, §1409.

²⁵ 26 U.S.C. §7203.

²⁶ Brown Commission Report §§1352(2)(a), 1355(4); S. 1, §2-6G2(a)(1), 2-6A(9); S. 1400, §§1343, 1346(4).

which are general, making no reference to tax returns, resulting in a possible nullification of the exclusion. One possible solution would be to incorporate in each penal section the language now in Section 7203 of Title 26, "other than a return required under authority of Section 6015 of Title 26" and the other Sections covering returns meant to be excluded. A somewhat more economical alternative would be to include a general provision in the proposed Code to the effect that there shall be no criminal sanctions imposed under any section of the Code with respect to any return or report intended to be excluded. The Section specifically opposes using declarations of estimated tax as a basis for criminal prosecutions. Unless they are so excluded, an anomalous situation would result where a taxpayer would be subjected to criminal penalties but exempt from civil sanctions.²⁷

The problem of what returns are reached by the proposed Codes and under what circumstances undoubtedly results from the attempt to coalesce several different offenses now in the Internal Revenue Code²⁸ under a general rubric. Sacrificed by this approach is the simplicity and clarity of present Code Section 7201 (that reaches evasion in any manner, by returns or otherwise) and Section 7203 (that reaches all returns except as specifically excluded).

II. DISREGARD OF TAX OBLIGATION

The Offense of Failure to File

The offense of failure to file, now covered by Section 7203 of the Internal Revenue Code of 1954, is punishable under both S. 1 (§2-6G2) and under S. 1400 (§1402). The Section of Taxation's primary objection to this offense is identical as to both Bills, for both require only that the failure to file be committed "knowingly" instead of "willfully" as specified in Section 7203 of the Internal Revenue Code.

It is the Section's position that reduction of the culpability needed for conviction for failure to file is unwise.²⁹ Under present law, the failure to file a tax return, absent some evidence of an affirmative act aimed at concealment, defrauding, or evasion, does not constitute felonious tax evasion. Failure to file cases, as opposed to fraudulent return cases, are often the product of carelessness, dilatory practices, reliance on the mistaken belief that the defendant's accountant or lawyer has filed the return, or, in many cases, mental or emotional defects short of legal insanity.³⁰ However the standard of "knowingly"³¹ would require less culpability for conviction of a crime than the present law requires for imposition of a civil late filing penalty.³² However, continuation of the present law's requirement of willfulness as the standard of culpability would, in our opinion, provide a workable border between a criminal's failure to file or withhold and the often pathetic cases of knowing, but noncriminal defaults.

False Withholding Statement

It is the position of the Section that claiming a false personal exemption on a withholding statement should not constitute an offense. S. 1400, §1402(a) (6). Neither overwithholding nor underwithholding is itself criminal in nature—indeed it is often officially advocated. If the year-end tax return is accurate and fully paid, no prosecution should ensue based on a false, but harmless, withholding statement.

²⁷ For instance, a taxpayer might file an estimated return showing his expected income to be the same as that of the previous year, which is false, but specifically permitted under 26 U.S.C. §6654(d).

²⁸ E.g., the transformation of some, but not all, of the offenses in 26 U.S.C. §§7201-07, with change or elimination of elements and increased penalties, into the two offenses of evasion and disregard of obligation.

²⁹ See statement of Mr. Asbill, p. 18.

³⁰ See Working Papers, p. 752.

³¹ We agree with the desire evidenced by both S. 1 and S. 1400 to create uniformity. We realize, at present, there is a split among the circuits as to the meaning of willfully in failure to file cases. Some circuits require an affirmative showing of bad faith or an evil motive while others require only a showing that taxpayer act knowingly. However, the solution is not to reduce the standard of culpability across the board. In any event, the proposed definitions of "knowingly" contained in §1-2A(a) (3) of S. 1 and §302(b) of S. 1400 are far more loose than even the loosest meaning attributed to "willfully" under present §7203.

³² The present law imposes a civil penalty if the failure to file a timely return was not due to "reasonable cause" but was due to "willful neglect". I.R.C. §6651(a) (1).

III. PENALTIES

The Section of Taxation has previously testified about its concern over the severe increase in the length of prison terms and amount of fines recommended by the Brown Commission for tax offenses.³³ Our concern is even greater over the penalties in S. 1.

The grading of offenses under S. 1 would raise the present maximum fine for tax evasion from \$10,000 per count to a maximum of \$1,095,000 per count (§1-4C1(a) of S. 1; §§7201 and 7202, IRC of 1954). The prison term under S. 1 for each count for evasion of a tax liability of \$100,000 or more could be up to 10 or 20³⁴ years (Class B felony). The majority of tax evasion cases would likely fall into the Class C felony category which covers evasion related liabilities of \$10,000 or more. The jail term per count would be from five to 10 years as compared to the five-year per count maximum under present law. (S. 1, §§2-6G1(b)(2), 1-4B1(a)). The maximum fine for a Class C or D felony would be \$547,500 per count. (§2-6G1(b)(3)). As the testimony of Mr. Asbill on behalf of the Section of Taxation, in March, 1972, indicated, all studies of sentencing in tax evasion cases have indicated that sentencing judges who are most familiar with the efficacy of punishment as a deterrent have found that, in cases where a prison term is warranted, it is the fact not the length of the term that counts.³⁵ Statistics compiled at the request of this Senate Subcommittee by the Administrative Office of United States Courts³⁶ show that nowhere near the maximum allowable sentence is imposed for tax offenses under present law. But in the case of racketeers where a longer sentence may be justified, flexibility is possible under present limits. Such cases are usually based on a net worth or similar reconstruction of income aimed at showing a pattern over a period of years of evading taxes by failure to report what is often illegal income. Such cases almost of necessity are brought on multiple count indictments. Only in a relatively simple "specific item" tax evasion case does the evasion relate to a single year and a single count indictment, while in organized crime cases the prosecution has the benefit of multiple count indictments and, therefore, consecutive sentences. Therefore, even in the drive against organized crime, the government now has and will continue to have under the new Federal Criminal Code, the ability to impose a far heavier sentence than would normally result from mere tax evasion by a business man.

The sentence for failure to file is limited to a one-year prison term, but the fine has been increased under S. 1 to a possible maximum of \$109,500 per count. S. 1400 (§§1402 and 2201(b)(6)) continues the level of penalties provided by present law. We endorse the position of S. 1400. There has been no showing of the need for any increase in fine for this offense let alone the astronomical increase under S. 1.

We strongly oppose the provision in S. 1400 (§2201(c)) that the fine in a crime involving monetary gain or loss can equal twice the amount of that gain or loss insofar as it might be held applicable to tax cases. We recommend that the legislative history clearly indicate that this provision is not intended to apply to tax offenses which already have civil deficiency, penalty, and interest provisions which already extract more than this amount from the wrongdoer.

We have serious reservations about the proposition in §1-4A3 of S. 1 that the sentencing federal judge may himself order disqualification of a defendant from his profession for a period equal to the authorized prison term (§1-4A3(b)). Our objection is based on constitutional and comity considerations. Licensing and the revocation of licenses is a matter for state officials and should not be pre-empted by the federal government or a sentencing federal judge. Even the length of suspension of a professional license is something that should be left to state officials so that at least within that state there is some uniformity in the sanctions imposed.

We heartily endorse §2303 of S. 1400, which provides a maximum limit on the accumulation of consecutive sentences for multiple count indictments by limiting the maximum authorized sentence for the total charge to the maximum authorized term for the next highest class of felony over the highest

³³ See statement of Mr. Asbill, pp. 20-23.

³⁴ The higher range is reserved for dangerous special offenders. S. 1, § 1-4B2.

³⁵ See statement of Mr. Asbill, pp. 21-22.

³⁶ Federal Offenders in the United States District Courts, Administrative Office of the United States Courts, p. 34 (1969).

felony for which the defendant is sentenced. This is a long-needed limitation on the sometimes incredible proliferation of consecutive sentences resulting from multiplicitous indictments.

Another aspect of the upgrading of the tax offenses in S. 1 so that all are felonies has perhaps not been considered. It may increase court congestion. Most criminal tax prosecutions now terminate in pleas of guilty, bargained or otherwise. If there are no misdemeanors to plead to, there will be a trial in virtually every case, either through fear of ruination by the vast potential sentences or of loss of licenses necessary to a livelihood through being convicted of what is termed a Class E felony (even though the penalties are no greater than for the present tax misdemeanors).

IV. DEFENSES

Reliance on Professional Advice

Reliance on professional advice is of particular importance to taxpayers. Laymen who receive ostensibly competent advice on complex tax questions have been under present law, and should under future law continue to be, entitled the assurance that they cannot be criminally liable for justifiable reliance on the advice of professional tax advisors. The defense of reliance contained in S. 1 (§1-3C6(b)(2)) and in S. 1400 (§532) is restricted to reliance on a judicial decision or official governmental interpretation and would not include reliance on the advice of counsel.³⁷ Thus, tax advisors would be required to warn clients that although they are giving their clients the best and most thoroughly researched advice possible, that advice would be no defense should the government decide to indict for a tax offense. However, such reliance would ironically excuse the client from the culpability required for civil penalties.³⁸

The Section of Taxation proposes that good faith reliance on the advice of counsellors and which reliance is, under all the circumstances justifiable, should constitute a defense, at least to the tax offenses in the proposed code.³⁹

It is the understanding of the Section of Taxation that §§1-3C5 and 1-3C6 of S. 1 and §501 of S. 1400, which provide for a defense based on ignorance or mistake of fact or law, would in many instances afford a defense to alleged tax offense.⁴⁰ What is not clear from the language is whether a mistake of law can be the counsel's mistake on which the taxpayer relies. Such mistakes frequently happen in the tax area and should continue to be nonculpable.

The formulation of the "affirmative defense" of reliance on a statement of law under S. 1 and S. 1400 is far too restrictive. It would require a taxpayer to demonstrate that his interpretation of the official statement was literally and completely accurate and unambiguous. Unfortunately statements of law, official or otherwise, do not frequently demonstrate that degree of clarity.

There also seems to be no valid reason for requiring that a taxpayer himself be a party to a judicial or administrative decision before he can rely upon it. (S. 1, §1-3C6(b)(2)(i), (ii); S. 1400, §532(b)(1), (2)). This is directly contrary to long-standing, unquestioned professional practice in the tax area.

Statute of Limitations

With respect to the bar of the statute of limitations as contained in S. 1 (§1-3B1(d)(1)), we would oppose applying to tax offenses the extension of the statute of limitations described in subparagraph (d). It provides that a prosecution for an offense, an element of which is fraud, may be commenced

³⁷ See statement of Mr. Asbill, pp. 18-20. The Section's concern over the possible elimination of this essential defense in the tax area has been increased by the statement in the sectional analysis of S. 1 that "Reliance upon the opinion of an attorney is not sufficient to give rise to a defense of mistake of law". 119 Cong. Rec. No. 6, p. 12 (1/12/73).

³⁸ See *Haywood Lumber & Mining Company v. Comm'r.*, 178 F.2d 769 (2d Cir. 1950).

³⁹ See statement of Mr. Asbill, pp. 18-20.

⁴⁰ Under §1-3C6 of S. 1, relating to ignorance or mistake of law, it is an "affirmative defense" if the defendant's conduct conformed with an official statement of law. We are not clear whether this precludes raising as a "defense" a defendant's mistake of law if it would negate the requisite culpability required for commission of the offense. We assume that both situations can be raised in defense but that conduct that in fact conforms to an official statement of law would be an affirmative defense without the need to inquire into culpability. However, the difference between a "defense" and an "affirmative defense" is nowhere satisfactorily explained and we are, therefore, somewhat uncertain as to the practical import of this distinction.

within one year after discovery. We are confident this was not intended to cover so-called tax fraud and feel the legislative history should so indicate.

There are often somewhat complicated questions regarding the running of the statute of limitations for the bringing of a criminal tax charge. For example, in *Jaben v. United States*, 330 F.2d 535 (8th Cir. 1964), aff'd, 381 U.S. 214 (1965), the defendant presented a case of first impression on a complicated question of the tolling of the statute of limitations. The defense was interested in contesting only the question of the statute of limitations before higher courts so a procedure was adopted in that case of entering a plea of *nolo contendere* to the charge coupled with a stipulation by the defense that it was entering the *nolo* plea but was reserving the right to appeal the issue of the bar of the statute of limitations to the Court of Appeals and to the Supreme Court. Ultimately, both the Court of Appeals and the Supreme Court affirmed the conviction. However, permitting the defense to follow that procedure avoided a time consuming trial on the merits. Section 1-3B1(g)(2) of S. 1 would apparently prevent the use of such a procedure. It provides that the statute of limitations is not a bar to any prosecution "as to which the defendant enters a plea of guilty or *nolo contendere*". Since the possibility of a statute of limitations defense may be the only basis on which a defendant would contest an otherwise complicated tax charge, the procedure followed in *Jaben* clearly promotes judicial efficiency and fairness. Such a defense should be allowed to survive the entry of a *nolo* or guilty plea as allowed to *Jaben* under Rule 12, Federal Rules of Criminal Procedure. Otherwise, the streamlined *Jaben* procedure would more likely than not give way to a full-blown trial merely to preserve the statute of limitations defense.

In addition, the proposed elimination of the statutes of limitations as a bar for pleading defendants would seem to offend due process, for it would tend to net only the ignorant or unadvised defendant.

V. OTHER OFFENSES OF POSSIBLE APPLICATION

The Problem

Both Bills leave doubt and uncertainty concerning exactly what substantive offenses contained in chapters of the proposed Code outside the tax chapter will be available to a prosecutor in revenue offense cases.

Substantive offenses of perjury, false statements, defrauding the government, obstruction of justice, conspiracy, complicity, attempt, and many others could, in concept, apply to revenue offense cases. Obviously this great variety of offenses should not be available to a prosecutor in his unbridled discretion in connection with revenue offenses.

Careful consideration should be given to the availability to the prosecution of such offenses. For our part we anticipate that the offenses of attempt, conspiracy, complicity, and false statements might well be applicable to revenue offenses but that no other offenses in the proposed Code outside the tax offense chapter would be violated by the filing of a false tax return. We urge that the applicability or inapplicability of such other offenses be clearly stated.

Therefore, we offer the following substantive comments on the offenses of criminal attempt, false statements, and conspiracy and complicity.

Criminal Attempt

If tax evasion can be an object of a criminal attempt and punished under Sections 1-2A4 of S. 1 or 1001 of S. 1400, the Section of Taxation has two comments.

First, the language of S. 1 seems preferable to that of S. 1400. S. 1 requires for a person to be guilty of criminal attempt that he act with the culpability required for commission of the crime and that he intentionally engage in conduct constituting "a substantial step toward commission of such crime". By contrast, §1001 of S. 1400 requires only that the person have the requisite culpability and that he engage in conduct which "corroborates his intent to complete the commission of the offense". Presumably the difference between the two is that under S. 1400 the defendant could be convicted for mere preparation, whereas something more would be required under S. 1. Under either Bill, a taxpayer would be literally guilty of an "attempt" if with the requisite state of mind he prepared a false return which, however, he did not file.

Second, a voluntary renunciation of the attempt, we feel, should be a defense, even if motivated by increased probability of detection or increased

difficulty of consummation. Such motivations destroy the defense of renunciation under the terms of S. 1. Renunciation is apparently not a defense at all under S. 1400. Internal Revenue enforcement policy is now based on seeking indictments and publicizing them shortly before return filing time in order to indicate to other taxpayers the likelihood of detection. It is counterproductive to punish for attempt a taxpayer who has responded by abandoning his attempt to cheat.⁴¹

The inevitable confusion which would result from prosecutorial use of the newly drafted offense of "attempt" in the tax area, in view of the special meaning that term has in the present evasion statute and the quite different meaning it has in common law offenses, was pointed out in Mr. Asbill's statement at pp. 5-7.

False Statements

Various provisions which punish the making of false statements to a federal officer or agency or furnishing false tax information are currently contained in 18 U.S.C. §1001; 26 U.S.C. §7204-7207, 7211, 7232 and 7241. These offenses are not covered specifically in the revenue offenses either of S. 1 or S. 1400. They appear to be covered generally by the false statement provision in S. 1 (§2-6D2) and S. 1400 (§1343).

The culpability required for false statements in S. 1 and S. 1400 is "knowingly". But, unlike S. 1, S. 1400 also forbids making a false statement "in reckless disregard of its truth or falsity * * *". Reckless disregard of truth or falsity is a highly questionable standard for conviction for false statements. As we read the comparable provision in S. 1 (§2-6D2), the somewhat higher standard of culpability—"knowingly"—is required for every form of false statement. The Section of Taxation urges that culpability for false statements in the tax area continue to be "willfully" as in present law.⁴²

Additionally, the Section of Taxation is opposed to the elimination of "materiality" of the subject matter of the allegedly false statement as a requirement for conviction under S. 1.

There would be many problems in the application of such generalized false statement sections as contained in S. 1 and S. 1400 in the tax area, since many "statements" are made which concern matters of technical legal definitions and classification under the Internal Revenue Code. There would seem to be a severe risk that mere errors or differences of opinion would be construed as false statements.

Apparently it is contemplated by the draftsmen of S. 1400 that false statements on returns, not necessarily resulting in a deficiency, would be prosecuted under Section 1343. Such an offense is now prosecuted under 26 U.S.C. §7206(1),⁴³ which, however, contains the safeguard that only false material statements in return are punishable if the returns contain language warning that they are "made under the penalties of perjury." Eliminating the disregard of such a warning as an element of the offense of a false statement on a return or other document would leave the Internal Revenue Service free to drop the warning yet nonetheless prosecute. This seems basically unfair, particularly since citizens have been long familiar with this warning and might well conclude from its absence that the same caution is no longer required in making entries on their returns or other submitted documents.

Failure to Appear, Produce Information, or Testify

There are essential problems with extending the provisions of S. 1 (§2-6C2)⁴⁴ and S. 1400 (§1332) to Internal Revenue summons and proceeding thereunder. It is not clear that the protective procedures now in effect under *Reisman v. Caplin*, 375 U.S. 440, 446-8 (1964), would apply, which allow a taxpayer, and require the Service, to test the validity of a summons in Court before invoking penal or contempt provisions.⁴⁵ The literal wording of each Bill would only render refusal to testify or produce, exempt from penalty on

⁴¹ The conspiracy sections of each Bill are similarly defective in handling the defense of renunciation as it applies to the tax area.

⁴² See *Holland v. United States*, 348 U.S. 121, 128-9, (1954).

⁴³ That Section is partially brought forward in the evasion Section of S. 1 (§2-6G1(a)) but is eliminated from the evasion Section of S. 1400.

⁴⁴ Section 2-6C2 of S. 1 would be made applicable to Internal Revenue summons by amendment of 26 U.S.C. §7210. See S. 1, p. 403.

⁴⁵ See statement of Mr. Asbill, pp. 26-7.

invocation of a constitutional privilege, if the accused was correct about the scope of the privilege relied upon, a matter not without its peculiar difficulties in the tax area. Lastly, it is not clear that good faith reliance on the advice of an attorney as to the scope of any privilege would be a defense. These problems do not arise under present law because of the *Reisman* procedure and the element of willfulness required for punishment of a summoned citizen.

Conspiracy and Complicity

There is a serious question as to whether the conspiracy or attempt sections of either Bill should apply to tax offenses. Tax evasion, specifically outlawed in both Bills, is commonly known as tax fund, i.e., defrauding the government of its revenues. S. 1 (§2-8D5) makes an offense, a scheme to defraud⁴⁶ that is similar in its elements to the evasion section. It expressly precludes the application of the attempt and conspiracy sections to that offense. In view of the similarities between the tax evasion offense and the defrauding the government offense, conspiracy and attempt provisions should also be inapplicable to tax evasion.

The offenses of complicity and solicitation⁴⁷ should also be expressly excluded from the tax fraud area because of the danger that wholly innocent persons engaged in the preparation of tax returns will be prosecuted because there is no requirement that a person have knowledge of, e.g., the falsity of a return which he has caused to be filed.⁴⁸

Solution

However these problems are resolved, in view of the broad sweep of many of the other sections of the proposed Codes, it is strongly recommended, for fairness and clarity, there be included a provision that conduct arising under or affecting the revenue laws may only be prosecuted under those specific sections and whatever remains behind in the Internal Revenue Code.

CONCLUSION

We appreciate the opportunity to present the foregoing comments and we remain willing and eager to offer any further assistance to the Committee, its Counsel, or the Committee's Staff.

Mr. McDONALD. I would be very happy to highlight it for you.

Senator HRUSKA. As you do so, let us know where you are so we can follow you.

Mr. McDONALD. Right.

On page 2 we have some concern about the transfer of the criminal tax provisions from title 26 to title 18. This concern stems from the fact that there is still left in title 26 what in many instances is the major deterrent and major concern of the tax cheat, namely, the civil fraud penalties of 50 percent of the amount of tax due. It doesn't take very many years after a taxpayer has falsely reported his taxes or criminally failed to file a return before the amount he owes the Federal Government can well exceed his total actual income for a year. Throughout, there must be a consideration of this.

In both bills, S.1 and S.1400, the major tax offenses are divided into two types. I'm on page 3 at the moment.

The felony of tax evasion and the general misdemeanor provisions of disregard of tax obligations, primarily the failure to file a tax return. There are, we note, important differences between the two bills, S.1 and S.1400. First, S.1 grades the offense of tax evasion in such a

⁴⁶ The government may be a victim as it is within the definition of "person" and "organization". S. 1, §1-1A4(51), (52).

⁴⁷ S. 1, §§1-2A3, 1-2A6.

⁴⁸ This danger exists because of the provision in S. 1 that the conduct of the aided person be "in fact" a crime, thus eliminating culpability, which includes knowledge, on the part of the accomplice or "solicitor" as to the falsity.

way that the class of felony, and therefore the amount of punishment, ascends as the evasion-related liability increases. In contrast, S.1400 makes all tax offenses a class D felony.

The other major difference is in the treatment of the misdemeanor offense, principally the failure to file a return. S.1 raises the simple failure to file a tax return to the status of a felony, although S. 1400 does not.

Let me point out our major concern with both bills. Both S.1 and S.1400 substitute the phrase, "with intent to evade," for the present element in the crime of "willfully," as the standard of culpability for a felony of tax evasion. Stemming from the *Spies* case in U.S. Supreme Court, the concept of willfulness has a long history. We appreciate that willfulness for tax evasion may or may not have the same meaning it has in other places in criminal law. This creates a problem in attempting to have one definition of willfulness applied to everything.

Nevertheless, we are concerned that this history of interpreting willfulness will be lost when the standard of culpability is shifted to the words, "intent to evade."

Mr. BLAKEY. Mr. McDonald, could I ask you a question at that point? Focusing on the definition of "with intent to evade," which is specifically included in S.1, page 79, lines 20 through 23, what in present law is lost by that codification?

Mr. McDONALD. As we understand the definition in the *Spies* case, willfulness today requires an evil intention accompanied by some affirmative act, such as altered entries in books or two sets of books, concealment of assets, or other objective tests of an attempt to evade. It is our concern that without those affirmative acts, particularly when failure to file is made a felony, that the mere noncommission of an act should not be made a felony without evidence of other affirmative acts of trying to cheat.

Mr. BLAKEY. Well, would your need be met if there was qualifying language added on page 79, say perhaps at line 22, to indicate that the conduct would not include a simple omission?

Mr. McDONALD. May I suggest for the committee's consideration, on page 76 at line 22 you might begin paragraph—

Mr. BLAKEY. Are you reading from 1400 or S.1?

Mr. McDONALD. I am reading from the committee print, and I'll have to go to page 79, small v. If that were preceded—

Mr. BLAKEY. May I direct your attention, Mr. McDonald, down to lines 20 to 23 which deal with the crucial intent to evade. That focuses squarely in on the problem that you are directing yourself to. And you will notice, when it speaks of "intent to evade," it speaks of a conscious objective to engage in conduct and to cause a result.

If you are troubled by the fact that conduct may include an omission, would you be satisfied with an addition, something to the effect of, "not including a mere omission"?

Mr. McDONALD. Jack, do you want to speak to that? We would prefer, I think, the requirement language, "commits acts of evasion or concealment."

Mr. BRAY. In making a comment, I think that Mr. Blakey's comment does somewhat go to the heart of our concern, that is, mere

passive conduct, mere omissions, insofar as they might be judged under the standard of the new phrase, "with intent to evade."

The essential dispute we have is not with Webster's dictionary definition of the word "willfully," because I think the language, "with intent to evade," probably easily satisfies that. Our concern is only with the significant judicial gloss, as we have called it, of the *Spies* and other cases on the use of the term, "willfully."

Mr. BLAKEY. I'm just trying to find out where lines 20 to 23 do not adequately codify that judicial gloss.

Mr. BRAY. The objective that's talked about here in lines 20 to 23 is "a conscious objective to engage in conduct and cause the result." With that definition one of the main mechanical problems we have is, what is the result referred to if causing the result is simply, and now I'm reverting back to the first example of tax evasion, in case of filing a tax return which is "false as to a material matter," if the result which is referred to in the "with intent to evade" language is the filing of the tax return without more.

Mr. BLAKEY. You can't read it that way. If the clause which you're reading is paren 1 then paren 2 says, "there is due and owing a substantial tax liability," and the intent, as I read the language, would have to apply to both, both the conduct and the result.

Mr. BRAY. Well, he certainly can file a tax return that can have an innocent understatement. That innocent understatement can be an amount which is in fact material. The language of the bill as we view it eliminates any—expressly eliminates any need for culpability as to the materiality of the matter eliminated.

Mr. BLAKEY. How do you read that in lines 22 and 23?

Mr. BRAY. I read that in line 35 on page 78, where the filing of the return which is false, "as to an in fact material matter." I read that, perhaps mistakenly, to indicate that no culpability whatever is required as to materiality of what is evaded. It is the other element that is—

Mr. BLAKEY. The lack of culpability would be to its characterization as material.

Mr. BRAY. Correct.

Mr. BLAKEY. But it would not be as to its falsity and that in fact it was part of the return: that is specifically required by lines 22 and 23. The materiality would be a legal conclusion.

Mr. BRAY. Well, that's the question we have, the middle ground, whether the falsity is the "result" that is referred to in lines 22 and 23 of 79. Our concern was that this could be read simply to mean that the objective—

Mr. BLAKEY. If the legislative history indicated that view was clearly wrong, would that meet your needs?

Mr. BRAY. That that particular thing was clearly wrong would certainly eliminate that problem.

Now the language you proposed, I believe, was a negative statement that this intent could not be satisfied by a mere omission. This would go approximately two-thirds of the way, I think, to the rest of our concern as to a new definition of essentially willfully—

[Senator Hruska leaves the room.]

Mr. BLAKEY. What would this subcommittee have to do to meet the other third—

Mr. BRAY. The subcommittee would have to make an affirmative statement, I believe, that some affirmative act indicating the conscious objective and intent to evade is required.

Mr. BLAKEY. Wouldn't that be carried by the use of the word, conduct? Conduct requires an act or series of acts. It also includes an omission, and if we negated the omission, mere omission, we would carry the notion of affirmative act, wouldn't we?

Mr. BRAY. Well, conduct certainly in the case of failure to file certainly can be omission.

Mr. BLAKEY. If we negated the omission explicitly and left merely the phrase, conduct without omissions, we would have to have acts.

Mr. BRAY. Presumably you would. Our preference, in hoping to achieve the ultimate in clarity so that essentially no one goes to jail in the early days of mistaken interpretations of the Act, would be to put in an affirmative statement.

Mr. BLAKEY. That would give you the three-thirds that you wanted.

Mr. BRAY. In my own view, that would accomplish everything that we need for the term, "willfully," short of an actual use of the term, "willfully," with legislative indication that the same meaning is applied under the present law.

Mr. BLAKEY. Would you want that same kind of definition, of with intent to evade, included in S.1400, assuming the basic text went forward?

Mr. BRAY. Yes.

Mr. BLAKEY. Thank you.

Mr. McDONALD. Yes. We have made the same suggestion and among ourselves we have suggested that in your fifth offense in the felony section, failure to file, that that begin with words of, "commits acts of evasion or concealment" and fails to file.

The simple failure to file is taken care of under "Disregard of Tax Obligations" and the line between the misdemeanor and the felony offenses should be more sharply drawn, in our opinion.

Mr. BRAY. Excuse me. If I might just interrupt for purposes of total clarity, Mr. Hale, who is the chairman of our special committee on Federal criminal code, has arrived just now from New York. Since the point we have just been discussing is the single critical point in our concern with the bill and since we may be discussing matters on which he has some additional input, I would like to suggest that if he has heard our recent discussion that perhaps he might make a comment on it.

Mr. HALE. I just arrived and I'm just getting oriented, so why don't you go on without me.

Mr. BLAKEY. Could we move on to the substantial deficiency issue?

Mr. McDONALD. Yes.

Another item that has given us concern, on page 7 of my statement, is that, in contrast to the express language of S. 1400, the requirement of a substantial deficiency or liability is specifically incorporated in S. 1.

Mr. BLAKEY. If the legislative history, assuming the text of S. 1400 was carried forward, if the legislative history of it indicated that the substantiality requirement which was now a matter of case

law was not intended to be negated but would be carried forward with it, would that satisfy you?

Mr. McDONALD. We still prefer, particularly in light of the Department of Justice's concession in discussions with us that they do not prosecute unless there is a substantial deficiency, and within our own section there is the problem of interpretation if the statute is unclear, why resort to the legislative history, we would prefer the S. 1 approach.

Mr. BLAKEY. Well, what I'm raising is, if the requirement of substantiality now is not on the face of the tax code and has been read in as a matter of either departmental policy or judicial interpretation, what would be wrong with leaving it in that status?

Mr. McDONALD. We have some concern that since the purpose of the statute is to codify the case law, any case law not codified might be held to be omitted.

Mr. BLAKEY. Okay.

Mr. McDONALD. We also, on page 8, point out that certainly, if you are going to grade offenses, that penalties and interest should not be included in the amount of tax used as a measure for the grading.

Similarly, we were very pleased by the approach in S. 1 which limited the grading element, if it is to be there, to the tax evasion related liability rather than the total amount of liability.

Mr. BLAKEY. You don't read the penalty and interest as being incorporated in the evasion related grading in S. 1, do you? You do read it to be in it?

Mr. BRAY. We have so far, perhaps mistakenly.

Mr. BLAKEY. If that were clarified I think that would meet your problem on S. 1.

Mr. BRAY. It would not meet the whole problem on S. 1, because I think, as Mr. McDonald—

Mr. BLAKEY. It would meet this aspect of it. It would not necessarily meet the grading aspect, but it would meet this aspect.

Mr. BRAY. Yes.

Mr. BLAKEY. Could we turn to the grading?

Mr. McDONALD. Yes.

On page 9 we begin discussing the grading, and our concern there is that if the amount of penalty and the class of felony depends upon the exact amount of tax, whether evasion related or otherwise, the trial of a tax fraud case will become much more cumbersome and practically unworkable.

Mr. BLAKEY. Is that true necessarily? I wonder if the Government simply indicted under the class D felony in S. 1 and tried it simply on that basis, which is a floor, whether you have the difficult questions of how much the evasion related liability was that would require this special verdict. It would seem to me that the only time you would have a complicated trial would be when they were indicted under the C or B law, and as long as the Government had the option of going to the higher or not depending on the clarity of its proof, in the routine case you probably would not have a difficulty.

Mr. McDONALD. The difficulty as we see it arises from the fact that at any point that there is a difference in penalty, say, \$10,000 or

\$50,000 or \$100,000, if the amount is in that neighborhood there would be a very bitter battle between the prosecutor and defense attorney as to whether you were over or below, and your juries would have to come in with a special verdict after hearing expert testimony from both sides as to the actual amount of liability.

Mr. BLAKEY. Don't juries do this sort of thing in all sorts of cases now, for example, the distinction between grand theft and petty theft is put at a dollar amount? Wouldn't this require in some cases expert testimony to evaluate the stolen property? Why would this be inherently different because it's tax as opposed to another form of evaluation?

Mr. McDONALD. Because the liability itself, if you've ever completed a 1040 and that is one of the simpler forms, is the result of many, many, many factors, all of which either raise or lower the tax by a few dollars.

Mr. BLAKEY. Well, what I'm saying is, aren't juries now, in other related areas, handling issues not substantially more complicated?

Mr. McDONALD. I doubt it. Even in civil practice we repeatedly avoid taking complicated cases to a trial by jury simply on the ground that we doubt that they will understand it. We have more faith in a single judge.

Mr. BLAKEY. All right.

Mr. McDONALD. I think our point on page 13 of the statement as to affirmative acts of evasion, we have discussed and we have suggested the language that might satisfy all of us.

Let me return, on page 15, to this question of failure to file as evasion or as a felony. Both S. 1, S. 1400 and the Brown Commission proposed statute increase to a felony failure to file. As we have indicated before in the *Spies* case, the mere omission is not enough, while in the failure to file cases being brought currently, the circuit courts do differ on the question of what is willful.

It is our feeling that to drop the culpability down to simple knowing, which means that you are conscious of your conduct and conscious of the result, is to lower the standard of culpability, and under those circumstances certainly we would not like the matter to be classed as a felony with all of the civil taint that goes along with that, as it is in S. 1. We would much prefer the S. 1400 continuation of the crime as a misdemeanor.

Would you like to supplement that, Lloyd?

Mr. HALE. No, I think that covers it very well.

Mr. McDONALD. On page 17, we indicate that we are concerned that the statute may reach too far in S.1, section 2-6G1(a), namely that declarations of estimated tax which are merely tentative tax returns, are brought into the category of returns which could be considered false for criminal purposes.

On page 20, we again repeat our concern with dropping the standard of culpability down to knowingly, and we are getting into the interesting position there that there is less culpability required in the criminal statute than there is for many civil penalties.

Then, finally, on page 22 we cover our concern with the amount of the penalties. There is a tremendous jump as we see it. Under S. 1 the grading would raise the maximum fine for tax evasion from \$10,000 per count to \$1,095,000 per count.

Mr. BLAKEY. There would be standards set for it's imposition; it wouldn't be simply a matter of just unbridled discretion of the judge.

Mr. McDONALD. Well, this is still a question in our mind, when you remember that you have a civil fraud penalty in addition to any of these penalties to be imposed. And I suspect that this is one reason that S. 1400 returns to our present scale of penalties rather than these penalties which, at least if you figure them out mathematically, seem considerably increased. As far as the imprisonment sentences, we question whether there is merit in increasing the possible sentences when, at the moment, the judges aren't even giving the maximum sentences permitted.

We do oppose, on page 24, the suggestion in S. 1400 that the fine in a crime involving monetary gain or loss can equal twice the amount of that gain or loss if it can be held applicable in tax cases. As we have suggested, they already have the 50 percent civil fraud penalty.

Then, at the bottom of page 24, we are concerned about adding to the possible sentences that a judge may impose, the ability to disqualify a doctor or an engineer or a lawyer from the practice of his profession for the maximum length of time that he could be sentenced in jail.

Mr. BLAKEY. Might that not be viewed as a less drastic alternative to achieving the same objectives that would have been achieved had he sent him to jail?

Mr. McDONALD. It might, but our feeling is that, certainly among lawyers, that it is the prerogative of either the State court or the Bar's disciplinary bodies to determine whether he is qualified to practice rather than the judge.

Mr. BLAKEY. The issue I'm raising is, any judge bent on seeing that this man does not return to his nefarious activities can incarcerate the individual. If his major concern is returning to the nefarious activities, that might be achieved simply through disqualification, and we would not necessarily have to have one more person unnecessarily imprisoned. It seems to me, on that analysis of it, disqualification might be viewed as a form of leniency rather than severity. I am fascinated by your construction of it in the other direction.

Mr. McDONALD. We see a potential conflict between the disciplinary boards and the courts in this.

Mr. BLAKEY. The question I'm raising with you is, a man sent to jail is in fact disqualified from the practice of his profession, and he's also imprisoned 24 hours a day, 7 days a week.

Mr. McDONALD. And he might prefer to be home with his wife or working at something else.

Mr. BLAKEY. That is correct.

[Senator Hruska re-enters the hearing room.]

Senator HRUSKA. Isn't it generally provided in the State licensing laws that conviction of a felony results in loss of standing as a member of the Bar?

Mr. McDONALD. Conviction of a felony would, Senator. There is some question in some of the States that the felony must involve moral turpitude, and I know the Service has had qualms about peo-

ple not being disbarred or not being removed from medical practice after having been convicted and fined in tax evasion cases.

Mr. HALE. Very briefly, the question of the Federal judges' power to disbar, if you will, let's just stick with that as an example for a moment, is not necessarily co-terminous with any prison sentence which he might be inclined to impose in the case anyway. So, in a situation where the judge felt, let us say, a year in prison was sufficient, or 6 months, nonetheless to allow him the power, in effect, to disbar somebody for the maximum term that could be imposed, I think not only runs into a conflict with the State licensing bodies but it really is sort of an unjustifiable power to grant him.

If it be thought necessary to retain this power or at least make it available to the judge perhaps it should be restricted to any actual term of imprisonment.

Mr. BLAKEY. Isn't that the way S.1 reads?

Mr. HALE. As I read it, it is up to the maximum term that could be imposed, so that he could get a sentence for 6 months and be disbarred for 10 years. That's one of the dangers I see.

Mr. BLAKEY. Well, suppose the judge felt the guy ought to be disbarred for 10 years and ought to have a short taste of jail as well, and then he gives him 6 months so that he will know what it would be like if he had to have the 10 years, in effect gets him off of the street and out of the nefarious activities by disqualifying him.

Mr. HALE. I would say it would be a rare type of case in the criminal tax area where the judge would really have available to him the type of information that is developed in bar grievance committee hearings. Particularly in New York, where I am from, we go quite deeply into details. There is an official referee and it's then referred to the Appellate Division. And there are full hearings and presentations which, I think, grant a basis fair both to society and the individual.

Mr. BLAKEY. Would you feel a little better about the disqualification section if it provided for a hearing and appellate review?

Mr. HALE. Well, you still have the conflicting jurisdiction problem. Except in a very limited sense that while the Federal courts don't admit people to practice the law, they admit attorneys licensed already to practice before their courts.

Mr. BLAKEY. Attempting to conceptualize the disqualification as an alternative to imprisonment I am still moved to come back to recognize that the jailing of a person effectively disqualifies him and there might be a less drastic alternative to imprisonment.

Mr. HALE. I can understand your concern. I think it is perhaps a matter of meshing these concerns in some way.

If I may respond just a little bit further to the question that Senator Hruska asked earlier, indeed many State statutes do provide for the lifting of licenses on conviction of a felony. Some distinguish between whether the felony is the same sort that would be classified as a felony in the State as well as federally. This is one of the severe problems we have with S.1 making the disregard of tax obligation offense, in name, a felony. Just the name, if you are in a jurisdiction that won't look behind or look into the type of conduct but will just say, well, there is a judgment entered for a Federal class E felony, that is it.

I am not just talking now about attorneys, but this kind of statute cuts across all kinds of licensing boards, real estate brokers for example. But I think just the classification without a real increase in prison sentences would reap unintended hardship.

Mr. McDONALD. Let me also highlight points made on pages 26 and 27 in connection with defenses. As we read S. 1 sections 1-3C5, 1-3C6, and S.1400 sections 501 and 532, on reliance or mistake of law, it seems a little harsh in the complex area of tax law to require that the statement of law upon which you rely must be a Supreme Court opinion, a decision of the court of appeals, statute, or a clearly publicized ruling from the IRS.

Mr. BLAKEY. If the legislative history made it absolutely unequivocal that section 1.3(C)(6) and the comparable section of 1400 had no application whatsoever to tax cases, and that advice of and reliance on counsel which has traditionally been part of willfulness, would be carried forward in the concept of, "with intent to evade," would that meet your needs?

Mr. HALE. I think that would go a long way toward doing it. But I would also extend it to the disregard of tax obligation as well as with respect to evasion statutes. You have any number of instances in the cases we have cited for instance, where an attorney was consulted and in effect implied his advice without actually saying that a personal holding company return didn't have to be filed because he didn't think it was required. The trouble is we have a bit of a mixed bag of legislative history already.

Mr. BLAKEY. There has been a conscious effort, at least on the part of the staff, to do its best to make sure everybody understands that the reasoning behind the Brown Commission's suggestion of ignorance or mistake of law was to introduce a wholly new defense to criminal law and to permit a defense of mistake of law where no culpability was required or asked in the requirements of the law. Those traditional defenses of mistake of law that necessarily involve knowledge of the law would be left undisturbed. I think that is the tax law now, and there would be no change.

Mr. HALE. Well, as long as that can be made clear somehow, of course, whatever the mechanism is. We don't have any specific suggestions. If you wish to have your staff meet with us at some future time to go over formulation of things of that sort, we would be happy to.

Mr. McDONALD. On page 28, we point out that we question a new statute of limitations and suggest that the legislative history indicate that that was not intended to cover the so-called tax fraud cases. The question of the statute of limitations running in criminal fraud cases is quite complicated, and many times there has to be a procedure, or there should be a procedure in which the defendant can contest this issue alone without having to go through the whole trial, probably through a plea of *nolo contendere*.

Finally, on page 30, we list the other offenses which appear in the same title and suggest that some of them should be made clearly inapplicable to the tax evasion and revenue offenses. Among those that we list are: On page 31, criminal attempt; on page 32, false state-

ments: on page 34, the failure to appear, produce information, or testify, and on page 35, the crimes of conspiracy and complicity.

With those suggestions, we want to commend the committee on its hard work in the effort to codify the tax crimes, and we will be happy to work with you to continue to improve the proposed bill.

Senator HRUSKA. Have you any further questions?

Mr. BLAKEY. No, sir.

Senator HRUSKA. Have you any questions, Mr. Lazarus?

Mr. LAZARUS. No, sir.

Mr. BLAKEY. I would like to extend the staff's sincere thanks to the committee for spending an obviously enormous amount of time working with many complicated pieces of draftsmanship. We appreciate the help that you have given us, and it goes without saying that you have given us a great deal of help. Thank you very much.

Senator HRUSKA. It will be very helpful, and it looks like a first class job, I assure you.

Mr. McDONALD. Thank you, Senator.

[A brief recess was taken.]

Senator HRUSKA. The subcommittee will come to order.

Our final witness this morning is the Honorable Marvin E. Frankel, and he appears at the invitation of this Senator which was extended after I had the opportunity to review briefly his new book on criminal sentences.

Before Judge Frankel begins I offer for inclusion in the record an excerpt from his book on the subject of appellate review of criminal sentences.

[The material referred to follows:]

CRIMINAL SENTENCES—LAW WITHOUT ORDER

(By Marvin E. Frankel)

APPELLATE REVIEW OF SENTENCING

Our system of justice, civil as well as criminal, is not notably speedy. To many of those who worry about law and order, the concern is that punishment for crime should be more certain, more severe, and, not least of all, swifter. Without stopping over the intricacies and varieties of views about "law and order," most of us may wonder from time to time whether appellate scrutiny of the criminal process does not tend in some respects to be excessively lengthy, detailed, and minute. Appellate courts write annual volumes about pretrial procedure, arrests, searches, phrases spoken to juries, rulings on evidence, and other episodes in or around the trial level. The ultimate goal, for all its imperfections, is precious. We strive to perfect and safeguard the grim process of detecting crime and ascertaining the truth about criminal charges. We are, at least most of us—usually—willing to pay a large price in time and "inefficiency" because personal security and *liberty* are at stake.

On a wide scale, however, the concern ends at the point of measuring the loss of liberty for the criminal defendant. In the federal courts and in some two-thirds of the states, there is in practical effect *no appeal* from the trial judge's sentence. To be slightly technical—i.e., accurate—I mean that a sentence within the prescribed maximum limits cannot be lowered on appeal. There are no genuine "exceptions" to this, though there are rare and narrow occasions when a higher court will correct or set aside the sentence as such. Thus, for example, if a trial judge were shown to have given a severe sentence on grounds of race or religion, his action could not stand. But this would not be because of "excessiveness." It would be because the impermissible (unconsti-

tutional) criterion would fatally infect the judgment and destroy its allowable character as an exercise of judicial discretion. There are other cases of similar kind and similar infrequency.¹

The basic point remains as I have stated it: neither the federal courts nor most states provide for any effective appellate review of sentences. I cannot know whether the reader finds this as horrendous as I do after living with it as a fact of professional life for many years. Consider that a civil judgment for \$2,000 is reviewable in every state at least once, possibly on two appellate levels. Then consider the unreviewability of a sentence of twenty years in prison and a fine of \$10,000. Consider that a distinguished committee of the American Bar Association, not normally an agency of revolution, when it urged appellate review of sentences in a report adopted and endorsed by the association in 1968, pointed out "that in no other area of our law does one man exercise such unrestricted power [as the trial judge's unreviewable sentencing power]. No other country in the free world permits this condition to exist."²

There are many reasons for this dubious distinction, none sufficient in my view. Before tearing at them, I report from random (and unscientific) samplings over a number of years the observation that most judges, both trial and appellate, seem satisfied with the status quo in this respect not less than others. There is no single position, naturally. But most trial judges, for all their protests about the agonies of the ultimate responsibility for sentencing, oppose the idea of appellate review. I shall come to the commonly stated reasons. First, if cynically, I suggest that one substantial reason, not commonly stated, is the (recognizably human) aversion to being criticized and countermanded. Most trial judges seek to follow, within their capacities, what they perceive as the controlling views of higher courts. It is a consistent, if not an inescapable, corollary that many at least are not keen to expand the scope of such controls. It is equally clear that this reluctance by itself is no valid reason for barring appellate review of sentences.

On this subject, appellate judges, if normally viewed as natural enemies, are numerous allies with the trial bench. Lending the most august support is Chief Justice Warren E. Burger, who has voiced more than once his opposition to appellate review of sentences, at least if conducted by the standard appellate tribunals.³ Again, the ranks are not closed; for example, Senior Judge Simon E. Sobeloff, former Chief of the Fourth Circuit (embracing Virginia, West Virginia, North and South Carolina), has long argued for review of sentences, lately adding to his writings and talks his service as head of the valuable A.B.A. Advisory Committee mentioned a few pages ago.

As is true of the trial judges, those on appellate courts have varying reasons, of varying cogency, for opposing review. One is the volume of new work it would entail. This, if better than the concern of trial judges not to be reversed more than they already are, is not enough better to warrant much

¹ The legal theory of this passage is familiar to lawyers, but may warrant a word of elaboration for laymen. Broadly speaking, a sentencing judge has discretion up to the statutory maximum and cannot be reversed if he stays within that maximum. But he is deemed not to be exercising lawful discretion at all if he allows himself to be moved by outrageous and legally excluded considerations such as skin color or religion of the defendant. Then his judgment must be nullified and the defendant must be resentenced in accordance with law.

But would you ever know that the judge transgressed the wide limits of his discretion by allowing race prejudice or the like to affect his decision? Hardly. I know of no specific case where such an atrocity is specifically disclosed, although the statistical evidence of its existence is strong. On the other hand, there are rare cases of judicial errors similar in legal theory if not in degree of horror. So, for example, judges have said on the record that (as other judges believe but do not announce) they give all draft evaders long prison terms instead of considering for each defendant the range from zero to five years. Such mechanical uniformity is a failure to exercise discretion and is, therefore, reversible error. Another case of analogous character is mentioned above, on pp. 41-2.

² A.B.A. Project on Minimum Standards for Criminal Justice, *Standards Relating to Appellate Review of Sentences*, approved by the A.B.A. House of Delegates in February 1968, New York, Office of Criminal Justice Project, 1968, pp. 1-2.

³ The Chief Justice has spoken in favor of a form of review by a panel of trial judges. Provisions for such review exist in four states. With all deference, I doubt the desirability of such a procedure. Judges of the same level reviewing each other have inhibitions and discomforts that impair the effectiveness of the appeal. Besides, for reasons touched on below, there are good grounds for having the appeal on the sentence combined with other questions raised for review.

discussion. Considering all the things on which appellate judges ponder, the effort to make sentences more rational and just would hardly seem unworthy of their labors.

It is also argued, with somewhat greater substance, that the review of sentences might distort the appellate process. In slightly inflated and cloudy terms, the thought has been put this way:

*** Appellate courts are designed to be students of the law, to consider questions of the law, and to act in a dispassionate and detached atmosphere. If there were to be appellate review, proceedings in appellate courts would be corrupted by appeals to emotion and sympathy, and the other things that go into sentence. As a result these great institutions would be deteriorated.⁴ A closely related argument is that making sentences reviewable might lead appellate judges to bargain in the disposition of appeals, trading off votes for affirmation against votes to reduce sentence.

This whole pattern of interrelated ideas serves to highlight the horrors of our attitudes on sentencing, not to sustain rationally the position against appealability. The notion that sentencing involves "emotion and sympathy," and thus could pollute the appellate process, reverberates with disturbing implications. If the thought has validity, what qualifies our trial judges to be trusted with this responsibility? Are matters of emotion and sympathy uncheckable—unreviewable? Are appellate judges really free in their daily work from emotion and sympathy? Among the answers to these questions is the vital point that the power to send people to prison for long stretches ought to be exercised in a system of law on grounds more objective and rational than vague sentiment. Insofar as decisions of this kind are likely to involve feeling as well as intellection, this is a factor adding to the need for a second look by the relatively detached appellate tribunals. If emotion and sympathy are inevitable factors, it would not really hurt appellate judges to suffer these qualities of the human experience. What is more to the point is that the virtues of a higher court include its separation from the face-to-face forensics of the trial court, promoting a useful quality of cool objectivity, even about matters that generate intense feeling in their immediate occurrence.

The fear that sentence review would lead to (presumably improper) bargaining in the appellate court has its own train of interesting premises. The basic assumption here is, of course, that there is and should be a rigorous separation between (1) the question of guilt or innocence, or, more strictly speaking, the validity of the conviction, and (2) the propriety of the sentence. It is certainly true that we act upon this assumption in a number of respects. It is also true, however, that the conceptual separation is not inescapably sound in principle and not uniformly enforceable in practice.

It is standard in the federal courts and most state trials to instruct juries that they are to concentrate exclusively on guilt or innocence, leaving the question of punishment, if there is a conviction, for the trial judge.⁵ This embodies vividly the idea of separateness of the two determinations. It reflects, to acknowledge the reach of the idea, that error must follow from "confusing" the questions (1) "did the defendant do it?" with (2) "if he did, what may or should be the penalty?" It is not the least bit doubtful that the questions are distinct and that the answer to one ought not logically to be influenced by the answer to the other. But when we descend to the slovenly real world of illogic and uncertainty, the neatness of the categories becomes blurred. Verdicts rest upon probabilities, not absolute certainties. To minimize ghastly mistakes, we demand a high probability for criminal conviction. We require proof that is "beyond a reasonable doubt." While the quoted words state the standard in *all* criminal cases, it seems unlikely as a practical matter that they always mean the same thing. It is questionable that a "reasonable doubt" in a case involving a hundred-dollar fine is the same kind or degree of reservation as it is in a case involving imprisonment for a long term of years. I suggest, however unorthodox it may sound, that the meaning *should not* be identical: we ought to be more sure of our ground in the graver case than in the relatively minor one.

⁴ Lawrence E. Walsh, *op. cit.*, p. 251.

⁵ Among the exceptions to this has been the procedure in some states for jury recommendations or decisions on capital punishment. In addition, a dozen or more states given to juries the authority to set terms of imprisonment.

There are instances in which the illogical intertwining of the verdict as to guilt with ideas about the sentence is less readily defensible in principle, but compellingly understandable in terms of basic human values. It is recorded, for example, that in eighteenth-century England, when scores of crimes, including many we now deem petty, were punishable by death,⁶ juries mitigated the horror by simply refusing on a large scale to convict, notwithstanding clear demonstrations of "guilt." If that could be shunted aside as laymen's irresponsibility, we know of similar conduct by the professionals not similarly discountable. There is solid evidence in our own day that trial judges sitting without juries in cases involving stiff mandatory minimum sentences (*e.g.*, *not less than* five years or more than twenty) have acquitted defendants they believed guilty because they deemed the minimum sentence outlandishly high for the particular case. That is a questionable course for a judge to follow. I do not linger to defend it. I merely mention it as a possibly relevant, interesting fact of legal life.

The upshot of the last few paragraphs is that the sharp division between questions as to guilt and questions as to sentence (1) is not always, and (2) should not always be, maintained. The fear that appellate judges will "confuse" the two subjects is overdrawn even in legal theory. Moreover, there are times when the two should by rights be thought about together. In a close case with a huge sentence, it makes sense to consider reduction of sentence as a possibly preferable alternative to outright reversal of the conviction. Insofar as the two subjects should be sealed off from each other, we must either rely upon our appellate judges to do right, or acknowledge that we are engaged in a comedy of straining at gnats.

It is relevant to note that our rule of non-appealability of sentences is maintained at some uncertain cost in hypocrisy and evasion. Deferring to the rule, appellate judges, being at least somewhat subject to "emotion and sympathy," are periodically horrified by cases in which the sentences, though within maximum limits, seem cruelly excessive in the circumstances. The most common response is a sorrowful wringing of hands, some wistful observations, and a futile reaffirmation of the appellate court's powerlessness to right the evident wrong. Not infrequently, however, the appellate judges will search out some strained species of "error" in the trial, not because they genuinely deem it a proper ground for reversal, but as a pretext for setting aside the intolerable sentence. Sometimes the appeals court will slip into the inelegant role of supplicant before the trial judge. Confessing impotence to review the sentence and finding no plausible ground for reversal, the appellate opinion will suggest that the sentence seems, perhaps, a bit barbarous and would the trial judge perhaps, when the case comes back to him, please be willing to have another look.

None of the several dodges or stratagems is seemly. A candid rule of appealability of sentences is plainly to be preferred. If the view persists that questions about sentence ought to be sharply separated from other questions, the obvious implementation is to have a separate appeal concerned exclusively with the sentence. This is the practice in England, where there is a distinct and separate "appeal against sentence." My own view is that one compendious appeal ought to deal with everything on which review is sought. But this is a relatively small detail. The main thing is to have *some* system of open, thorough, straightforward review on appeal of the sentencing decision.

One substantial issue remains to be mentioned. It is said often that sentencing is a matter of "discretion," as distinguished from "law," and hence is unsuited for inclusion among the "questions of law" that comprise the domain of appellate courts. Interwoven with this theme is the conventional assertion that the trial judge has the unique and unreproducible advantages of seeing the defendant, "sizing him up" and possessing from daily exposure a seasoned wisdom in the use of such firsthand impressions. Appellate judges studying a "cold record" are in this light unable to contribute, but will only impair the sentencing process with their second guesses.

Disposing first of the latter point, I think it fair to describe it as minor and largely phony. The trial judge's keen eyes and ears have been mythologized in more contexts than this one. The uses of the trial and the sentencing hearing

⁶ Including, for example, forgery, sheep-stealing, the picking of pockets, and threats to burn a barn or hayloft.

for appraising the defendant in relevant respects are much overrated. The trial judge's powers of effective observation are likewise exaggerated; some judges are astute people-watchers and may sometimes learn useful things. But the whole subject is overblown, and the conclusion against appellate review does not follow in any event. It is familiar in the law that an appellate court should take into account the special capacities and advantages of the trial judge and pay appropriate deference where the opportunity for direct observation is likely to make a difference. Thus, on the accepted view that observed demeanor of a witness is a highly pertinent datum for appraising credibility, appellate courts will rarely substitute their own credibility determinations for those of the trial judge. For this and related reasons, the trial judge's findings of fact are not readily reversed, the formula familiar in the federal courts and many others being that such findings are upheld unless "clearly erroneous." This does not mean fact findings are unreviewable. It means only that upon review they are not easily or lightly reversible. Similarly, the trial judge's unique opportunity to observe the defendant may affect the style and scope of review, but need not and should not preclude review altogether.

The talk about sentencing lying in "discretion," and thus outside "law," bundles together a complex of conceptions and misconceptions that goes far to summarize the evils of the system. It is true that as we now handle this enormous power, trial judges are invited to proceed by hunch, by unspoken prejudice, by untested assumptions, and not by "law." But that is, as I have argued, the crux of what is wrong, not an argument for keeping things as they are. Correctly understood, the "discretion" of judicial officers in our system is not a blank check for arbitrary fiat. It is an authority, *within the law*, to weigh and appraise diverse factors (lawfully knowable factors) and make a responsible judgment, undoubtedly with a measure of latitude and finality varying according to the nature and scope of the discretion conferred. But "discretionary" does not mean "unappealable." Discretion may be abused, and discretionary decisions may be reversed for abuse.

The contention that sentencing is not regulated by rules of "law" subject to appellate review is an argument for, not against, a system of appeals. The "common law" is, after all, a body of rules evolved through the process of reasoned decision of concrete cases, mainly by appellate courts. English appellate courts and some of our states have been evolving general, legal "principles of sentencing" in the course of reviewing particular sentences claimed to be excessive.⁷ One way to begin to temper the capricious unruliness of sentencing is to institute the right of appeal, so that appellate courts may proceed in their accustomed fashion to make law for this grave subject.

I describe this as "one way." It is not the only, or a sufficient, way. The world has changed greatly from the time of relative simplicity and slow movement when most law was the common law made by judges. Speed and complexity have required exponential increases in legislative action. Comparable needs call for extensive study and action by the Congress and the state legislatures to govern the field of sentencing. I shall add some broad-stroke thoughts about this later on. For now, however, recognizing that the events of politics and government do not march in single straight lines, I merely mention an awareness of the pervasive interrelatedness. The enactment of legislation makes appellate review simpler (with more precise guidelines) and narrows the area open for judicial lawmaking. The fashioning of reasonably specific rules may have the effect ultimately of making appellate review less urgently necessary—though we do not deny appeals where the law is relatively precise and detailed.

But abandoning all the permutations the future may bring. I stump here for appellate review of sentences as one step toward the rule of law in a quarter where lawless and unchecked power has reigned for too long.

Senator HRUSKA. Welcome. Your Honor. We're glad to have you.

Judge FRANKEL. Glad to be here, Senator, thank you.

Senator HRUSKA. You have filed with the committee a statement, and you may proceed to read it or to highlight it, as you wish. It will be printed in its entirety in the record.

⁷David A. Thomas, *Principles of Sentencing* (London, Heinemann Educational Books, Ltd., 1970) is a scholar's synthesis of the propositions gleaned from English decisions of "appeals against sentence" during the period from January 1962 to October 1969.

[The statement follows:]

THE PROPOSED AMENDMENT TO CRIMINAL RULE 35, CREATING "SENTENCE REVIEW PANEL" OF DISTRICT JUDGES, IS NOT AN ACCEPTABLE SUBSTITUTE FOR GENUINE APPELLATE REVIEW

Like an increasing number of others, I have written elsewhere of the commanding reasons why there should be appellate review of federal sentences. This brief statement has a narrower purpose: It is to present grounds on which I believe the peculiar form of district court "review" in the proposed new subsection (c) of Fed. R. Crim. P. 35 should be reported.

The proposed addition to Rule 35 would allow a defendant to make a "motion for review" of a sentence of imprisonment for two years or more. It would provide for a "sentence review panel" in each district composed of three district judges of the circuit assigned by the circuit's chief judge. Review would be on papers unless the panel permitted oral argument. The panel could confirm, or, if it deemed the sentence excessive, modify or reduce it. The panel's order would "be final and not subject to further review or appeal."

The Advisory Committee in discussing this proposal notes some of the vital objectives to be served by review of sentences: the reduction of disparities; the promotion of respect for law through the granting of an appeal, giving the sentence as much importance in this respect as, say, the civil measure of damages or a dispute about the hearsay rule; and the development of sentencing principles and criteria—of "law"—through the case-by-case process of decision which has been, of course, the source of our common law. These purposes are not, in my view, approached adequately by the quasi-appeal to a coordinate trio in proposed Rule 35 (c). And the supposed reasons for this substitute—mainly that the courts of appeals are (a) too busy and (b) incompetent to review sentences—are unpersuasive. I detail and expand these views in the numbered paragraphs that follow.

1. It is vital, as the Advisory Committee observes, that we begin to evolve sentencing law through the process of reasoned decision, following the method of the common law. This is the historic role of appellate courts functioning in their accustomed way. Appellate courts have the status, the work habits, and the organization for producing opinions that are by definition evolving "authority." No comparable product could be expected from the parochial efforts of a "review panel" for each district. Evidently recognizing this among other things, the Advisory Committee points out that the proposed panel would not be required "to give written reasons" for its decisions. If the panel chose to give reasons, who would notice? Certainly the stature and impact of its expressions would not approach those of appellate opinions from the Circuit.

2. Underscoring the same quality of low level trivialization, Rule 35(c) would make the panel's decisions final. Questions as to sentence would thus remain confined to the district court level, not to reach the Circuits, let alone the Supreme Court. This would disserve the professed objective of promoting "respect for law." Questions about directors' liability, about the scope of the Tort Claims Act, and about jury charges in Jones Act cases are all eligible for review by the Supreme Court of the United States. But the question whether a 25-year sentence may be too long must never get higher than the district court. The resentment provoked by this kind of contrast might make the cure worse than the disease in its net impact upon respect for law.

3. It is not suitable or comfortable to have district judges sit in review of other district judges. Experience and common sense teach that there are in such an arrangement counterproductive qualities of constraint and embarrassment. This is not a personal matter, but an institutional one. A retired Chief Judge of my Court, the Hon. Sidney Sugarman, used to refer jestingly to the judges of the Court of Appeals as our "natural enemies." The jest, like many occupational quips, reflected a serious reality. Court of appeals judges are formally commissioned to review district judges. The formality is a meaningful source of reassurance on both sides of the relationship. The best of personal friendships are easily put to one side when the judge of the higher court decides professionally whether to affirm or reverse the lower (and different) court. There are no ambiguities or inhibitions. The situation is quite different when someone from your own court or level is reviewing you or being reviewed by you. There may be feelings of solicitude, discomfort, or leanings—

over-backward to resist such feelings. We avoid even the possibility of such problems in provisions for review of everything else by higher courts. We should do at least as much for a subject so potentially laden with emotion as that of sentencing.

4. A primary justification for proposed Rule 35(c), providing district court review rather than the normal form of review, is stated by the Advisory Committee in these words:

"Using a panel of district judges permits those judges most experienced with sentencing to participate in the review process. It thus avoids, as a major objection to review of sentences, the argument that appellate judges are not qualified for the task."

My position makes me entirely receptive to suggestions about the limited talents and capacities of appellate courts. I must, nevertheless, reject the view that such courts are less fitted for review of sentences than for the numerous other kinds of appeals they now hear.

Assuming for the moment some special sentencing qualifications of trial judges, many members of the courts of appeals have in fact served on the trial bench. Today, for example, of eight active judges on the Second Circuit, five were formerly district judges. To the extent that trial court experience is germane, they have presumably acquired it.

The notion of trial judge expertise is, in any event, inflated and, to a large extent, a misconception. Of course, trial judges do a lot of sentencing. They also rule a lot on evidence, find facts, decide if patents are valid, etc. Nobody says for this reason that appellate courts are disqualified (or incompetent) to rule on evidence questions, review fact findings, or hear patent appeals.

It is said, however, that only the trial judge sees the defendant, gets to "know" or have a direct "feel" for him. This, too, is exaggerated, and at best a mixed kind of advantage for the district judge. A huge percentage of sentences are imposed after guilty pleas. The trial judge, who hears the defendant in a brief sentencing proceeding, knows little of the defendant beyond what he obtains from the presentence report. The same is substantially true where there has been a trial; often the defendant does not testify; even when he does, what is displayed may well be irrelevant to, or possibly misleading for, sentencing purposes. The appellate court, in a word, can usually have substantially the same pertinent material as that available to the trial judge. Moreover, the first-hand knowledge, normally cursory and superficial, is almost as much a danger as it is a benefit. Too many trial judges fancy themselves as amateur psychologists and function all too verily as amateurs. The subject does not lend itself to statistical analysis, but this reality must be weighed in the reckoning.

Insofar as trial judges have advantages unavailable to the appellate court, this is not an argument against appeal, but only a factor to consider on *scope of review*. This point is so familiar one would hesitate to make it if it were not so steadfastly ignored by the opponents of sentence appeals. For example, it is generally supposed that the trial judge, having seen and heard the witnesses, is often better situated to find facts than an appellate court reading a cold record. We don't for this reason insulate fact findings against review. We do provide, under Rule 52(a) of the Federal Rules of Civil Procedure, that fact findings by a judge may be reversed on appeal only upon a determination that they are "clearly erroneous." Comparable limitations could be imposed—and would certainly evolve in any event—upon the review of sentences.

Above all, let us keep in mind that a prime function of appellate courts, for sentences as for other things, is to review and develop propositions of law. Disparate sentences are fundamentally lawless. The mitigation of this evil is as high and worthy a function as any now performed by our courts of appeals.

5. Finally, I come to an argument which has merit and high auspices but (to me) far less than decisive weight: that appellate review of sentences in the usual mode should not be allowed because it would impose unacceptable burdens of work upon the courts of appeals. See, e.g., Henry J. Friendly, *Federal Jurisdiction: A General View*, pp. 36-37 (1973). We do not know, of course, how large the burden would actually be. My own hunch is that the usual attack upon a sentence would be short work (which means, in other words, most would be affirmed, but does not lessen the need for allowing appeals). But passing that, it simply will not do to deny appeals because they entail work—certainly not now, when our appellate courts spend so much of their time on matters of smaller moment.

The courts of appeals now review evidence questions and issues of state law in automobile accident cases brought to the federal courts because of diversity of citizenship. Similarly, they hear appeals in all sorts of contract cases, copyright issues relating to last year's textile designs, the validity of patents for girdle fasteners, and myriad other things not necessarily momentous. If there are to be second-class "appeals" to panels of district judges, perhaps some of these random types of cases should be considered. Whether or not that is done, the problems of sentencing are too important for such treatment.

In any event, the device of a panel of district of judges does not save judicial time. If the panel is expected to do a genuine job, it will presumably take at least as long as review by an appellate tribunal. Indeed, it may take longer. Sentence review by the court of appeals would commonly be but another point in a case already being heard. Moreover, the courts of appeals are organized precisely to review in the normal course of their work whereas the three district judges would be required to interrupt and depart from their accustomed activities to participate in sentence review.

It may be that sentence appeals in guilty-plea cases (where now there is rarely any other ground for appeal) should be limited in some way. The Committee might wish, for example, to consider a variant of the English system, under which leave must be obtained from one judge to carry the appeal to the full bench of three. Whether or not such a device should be considered now—or whether, as I would prefer, it should be put off until actual experience with sentence appeals demonstrates a need—I urge that proposed Rule 35 (c) should not be deemed an acceptable substitute for recourse to a higher tribunal for review of the sentence.

MARVIN E. FRANKEL,
U.S. District Judge,
Southern District of New York.

STATEMENT OF HON. MARVIN E. FRANKEL, JUDGE, U.S. DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Judge FRANKEL. I will try not to read it in full, Senator. As the statement indicates, I have come for a relatively narrow purpose but, for me, an important one. I have come to support a bill, your bill, one of many that would provide for the kind of general appellate review of sentences that is not present in S.1 or S.1400 and has not existed in the Federal courts for a great many years.

I think the basic reasons favoring such a statute have been stated, if I may say so, quite ably by you, Senator, in your introduction of this bill and bills during prior Congresses; and I don't think, especially since you have been kind enough to include my views in the record as I have recently written them, that I should take much of the time of this committee speaking generally on the principles favoring appeals raising questions about sentences.

I do want to say, simply, for what it may be worth, that as a Federal trial judge who has sentenced, I'm afraid, a great many people over the last 7½ years, I support this from the vantage point of my own direct involvement with the difficult problems of sentencing. I will say briefly that I think the appellate process is needed to help with the desperate problem of disparity in sentencing.

I think it is needed to begin to evolve some standards and criteria for sentencing which are regrettably lacking in our system and I think, as the American Bar Association Committee has pointed out, that appellate review would promote some measure of respect for law among people who are sentenced and among others who are involved with this rather unruly process as it now exists.

I don't think a man occupying my position needs to say, but I will say, that my favoring appellate review implies no disrespect for

those who sit on Federal trial courts or other trial courts. By and large, though I am prejudiced, I think the Federal district judges are mostly conscientious, earnest and troubled suitably about problems of sentencing. But I think that no group of men, however wise or well-intentioned, can substitute for a system of law, as I have written.

I think we lack a genuine system of law respecting sentencing under the present state of affairs. Appellate courts, as has been characteristic of our common law system, have as one of their main functions the formulation of principles of law in the fields where they function.

Now, the narrow and particular reason I have accepted your kind invitation to be here is to speak specifically against a proposal which I suppose would be a substitute for the kind of appellate review contemplated in S. 716. As you know, the Advisory Committee on Federal Rules of Criminal Procedure, perhaps recognizing appellate review of sentences is probably over the horizon, perhaps for other reasons, has recently proposed an amendment to rule 35 of the Federal Rules of Criminal Procedure, specifically to subsection (c), which would provide for review of sentences, of sentences of 2 years or more in length, by a panel of district judges within each district.

What I want to say, and what I want to try to support, very briefly, is that this seems to me to be a poor and unacceptable substitute for review in the normal way by the usual appellate courts of the kind provided in S. 716, and I have listed in my statement five reasons for that position.

First, as I have said and as most people who think about this agree, a primary function of having appellate review is the law-making functioning served by an appellate court in the process of decision. The opinions of appellate courts and the modes of their functions follow a common law system. Our 11 circuits supply authoritative precedent in their decisionmaking process that would not be achieved by these panels of district judges sitting in separate Districts.

Indeed, as the Advisory Committee contemplates, and as we could anticipate, it is expected that these three district judges would commonly not write anything. Furthermore, if they did write anything, it would not be very meaningful. It would be law, so to speak, for the single district, and we have ninety-odd districts in the United States, so that the creation of law and the corollary minimizing of disparity would not be achieved at all by these panels of district judges.

Mr. BLAKEY. Judge, would you mind if we ask you questions as you go along?

Judge FRANKEL. Not at all, sir.

Mr. BLAKEY. Well, let me ask you one question at this point. You indicate perhaps one chief benefit that could be achieved by appellate review would be a formulation of a jurisprudence of sentencing. Could that be done by having only defendant review? Wouldn't it be necessary also to have prosecutor review?

Judge FRANKEL. I don't think so, Mr. Blakey. I think that most of our criminal jurisprudence, generally throughout the substantive

and procedural criminal law, has been made in reviews sought by defendants.

MR. BLAKEY. Isn't there a considerable body of opinion which feels that this is skewed now, and skewed in part because it has only been sought on behalf of the defendant?

Judge FRANKEL. I think there is an opinion in specific areas and some of it is reflected in the pending bills, that at least some subjects ought to be open for review at the instance of the prosecution.

MR. BLAKEY. I am thinking now in the area of search and seizure. For a long time we had no appellate review of granting the motion to suppress. In recent years, however, we've had that kind of appellate review, and, fascinatingly enough, we have gotten some very enlightened courts of appeals opinions that have made a search and seizure law a little more evenly balanced, and have gotten rid, perhaps, of some of the aberrations of trial judge opinions.

I wonder if we lack that mutuality that could deal with both the problem of leniency and the problem of severity, whether or not the articulation of the jurisprudence of sentencing would tend to deal only with the aberrations in favor of severity, and you would never deal with that other polar position of the aberration in favor of leniency that would permit a balanced and at least two-sided development of the jurisprudence.

Judge FRANKEL. Well, as you know the question whether there should be power in the appellate court to increase as well as decrease, I think in the way of appeal of a prosecution—

MR. BLAKEY. Well, the prosecutor ought to be able to appeal initially too lenient a sentence.

Judge FRANKEL. I would prefer, because it is a whole large subject in itself on which I have not done my homework, to pass the possible Constitutional problems in that kind of a review and assume that such a provision would be valid. I'm not at all suggesting that it would not be. I question at this time the need for it. I question, as I study the American system of sentencing, first of all, whether the problem of excessive leniency actually exists in our system.

MR. BLAKEY. Are you familiar with the record that was established by this subcommittee in the processing of the Organized Crime Control Act in dealing with the lenient sentences imposed by Federal district judges on organized crime offenders?

Judge FRANKEL. No, I am not familiar with that, and all I can say is that my own study of specific sentences, including areas where people have argued that there was leniency, undue leniency, has not persuaded me that this is a widespread problem. As a matter of fact, it may well be your interpretation.

MR. BLAKEY. Are you familiar with the recommendations of the President's Crime Commission that there be some kind of appellate review of too-lenient sentences by judges in organized crime cases?

Judge FRANKEL. Yes, and I'm familiar with the ABA Committee and its proposal, at least giving the power to increase sentences, presumably based on the belief that many sentences are too lenient. As to the evolution of jurisprudence, of course, I don't think that is a

great problem in this particular area. I think where judges are being too lenient, guidance could come from the appellate court even though appeals were only taken by defendants. As to the question of whether we have too many sentences that are too gentle, I suppose, fundamentally there is, to begin with, an empirical problem, and my general sense of the matter is that it is not a grave concern.

Now, if the Congress, this committee, and others would conclude that I am mistaken in this view, I suppose that would be a powerful argument for considering the allowance of appeals by prosecutors.

Mr. BLAKEY. Let me raise this cognate question with you, Judge. Some people have argued that sentences are too lenient, and rather than adopt an appellate review model, have argued for minimum mandatories. Might not appellate review of sentencing by the prosecutor with the idea of increasing be viewed as a less drastic alternative to minimum mandatories?

Judge FRANKEL. Well, I think they raise separate questions, actually. In most of the situations I have encountered, and there have been many where the difficulties of mandatory minimum were confronted, everybody involved agreed about the difficulties, including the prosecutor, who agreed that this kind of procrustean sentencing arrangement was unacceptable and hurts the prosecution.

I think you are aware that prosecutors increasingly oppose minimum mandatory sentences for lots of reasons that concern them in effective law enforcement—difficulty in getting convictions, their own reluctance to prosecute cases where they feel that compulsory punishment will be grossly excessive in the particular case, the feeling that judges may stray when they are confronted by sentences that are out of line and that are mandatory. So the idea of an appeal by a prosecutor as an alternative has not come home to me very directly. I think they're mostly separate questions, each to be faced on its merits.

Mr. BLAKEY. I'm thinking the motivation that might lead one to adopt either approach could be similar. I am wondering whether the defects which you very ably have outlined in minimum mandatories would be applicable to appellate review by the prosecutor. It would lack that inflexibility.

Judge FRANKEL. No, the defects that attend a mandatory sentence are not present in the prosecutor field. They are somewhat different defects. That is why I don't regard one as a substitute or alternative for the other, though I do understand your point that the concern of tender-hearted judges may account for either of these possibilities and that we might have to choose between them. If we had to choose, I would have a tough question.

Mr. BLAKEY. If you had to choose, how would you, on the present state of the record?

Judge FRANKEL. If I had to choose on the present state of the record, I would gamble on prosecutors' appeals. I have passed the constitutional questions.

Mr. BLAKEY. Frankly, Judge, we wouldn't ask you to give a constitutional opinion.

Judge FRANKEL. All right. So, passing that, I would say that I would be more comfortable with the case-by-case determination that

would still remain open if the prosecutor would appeal than I would be with mandatory minimum sentences.

Now, on the question of appeals, my second objection to the proposed rule 35(c) of the Federal Rules of Criminal Procedure relates to that area. Under that provision, the decision of the panel of district judges would be final and unreviewable.

Now with that kind of arrangement the hope of promoting respect for law among defendants by providing them with sentence review would be defeated. I think the contrast between the appealability of all other kinds of determinations to higher courts in civil as well as criminal cases, the contrast between that and the prohibition against going any higher than the panel of district judges with respect to sentences, would be an unhappy contrast for anybody examining this and making a judgment about how much the law serves and deserves to be respected on this score.

Now, I also—I suppose it's fair to say this is based in part on personal experience but also just on general observation, I also feel it is unsuitable to have district judges sitting in review of each other. I think there is a kind of discomfort, a sense of constraint, embarrassment, sometimes probably a tendency to lean over backward or forward in that situation, which is not in fact present when we have a separate, higher court, as we call it, sitting and hearing appeals.

This is, I believe, a kind of institutional thing and a general one. Many appellate judges have as close friends judges who sit on courts below them. I think there is no hesitation or constraint or embarrassment whatsoever for an appellate judge reversing his dear friend because that is his job, it is his institutional role, and I don't think there is any kind of sensitivity on either side on that score.

I think it does exist when judges sitting on the same court on a coordinate level are called upon to review each other. As I say, I base that in part on a brief exposure in our own court of appeals, in part on conversational research, and partly, I guess, on just general commonsense of the situation. But I believe it to be a significant factor.

Now, the proponents of rule 35(c) raise a point which I suppose is, in its thrust, a point in opposition to S. 716 and has been heard over and over again—that district judges, trial judges, are somehow especially qualified to consider problems of sentencing, and that appellate judges lack those qualifications, so that they should not be empowered to intrude on that subject.

I think this argument is based on several fallacies. First of all, a number of judges of our courts of appeals have been district judges. To the extent you need that experience, they've had it, and in the statement I filed with this committee I have mentioned just as an example five of the eight active judges on my circuit, the second circuit, were formerly judges of the district courts.

Second, I think that the value of the alleged experience acquired by people on the trial bench has been overstated. I don't think that the practice of sentencing in the rather unruly way we handle sentencing today has necessarily generated great wisdom among those who do it in the areas that we're concerned about.

We're concerned first of all, when we talk about appeal and review, with areas of law, with the evolution of principles of law for

sentencing, with the creation of rules that will achieve some measure of equality that we don't have in sentencing.

I don't think we need sit and face a flesh and blood defendant in order to think creatively and usefully about the effect of such rules. I think, too, that some of the content of this exposure has been exaggerated. Most of our defendants plead guilty, and the knowledge the district court acquires of most of them is very limited.

The district judge learns most of what he learns, as practical matter, from reading the presentence report, which is available to the appellate court as well. His face-to-face understanding of the defendant, I fear, frequently is a two-way matter which sometimes has as much potential for hurt as it does for help. I think sitting on a bench, having this kind of enormous power over a man or a woman who is standing in front of you, tends to encourage whatever feelings of omnipotence and omniscience people get in that position.

Many judges begin after a while to think and see themselves as psychological experts and penologists, though in all deference to them, I question whether they really have achieved the kind of expertise they sense in themselves. Many of them, based on their kind of curbstone notions about human nature, do nearly as much harm as good, based on their direct acquaintance with defendants.

I don't want to overstate the limits of the insignificance of this face-to-face situation. It has some utilities and it makes a difference. Insofar as it does, there is no reason why the appellate reviewing tribunal should not be expected to take it into account the way it does in other situations. We have rules, for example, that a district judge's findings of fact, because he saw and heard the witnesses, may only be overturned if they are clearly erroneous. There are lots of rules where we give deference to the discretion of the district judge, in granting injunctions, for example, and in other areas. But those rules, deferring to a trial judge, do not cut off review. They go simply to the scope of review.

I think equally, in sentencing, the jurisprudence you would evolve would very quickly come to contain the recognition of such limitations in the appeal and the recognition that you would have to pay heed to what the district judge presumably knew better and understood better than the appellate court.

As I say, that is no reason for not having review, but it is simply a reason for defining the scope of the review with an awareness of that reality.

Finally, the opponents of a measure like S. 716 and, I guess, those who favor rule 35(c), have expressed concern about the enormous added burden that appellate review of sentences would place on courts of appeals. I don't think that can be ignored. Obviously it would be a considerable increase in business of courts of appeals. How much it would be, we don't know.

I think the prospect has, to some extent, been exaggerated. People assume that all sorts of defendants who now plead guilty will be taking appeals. That is probably an exaggerated prediction. Many of them, or most of them—I shouldn't say most, because I don't know—a very substantial majority will turn out to be satisfied with their sentences. After all, a large proportion of the people who plead

guilty get probation. They're not likely to do much better than that on appeal.

Mr. BLAKEY. Judge, you might be aware of the suggestion made to the subcommittee by the Criminal Law Section of the American Bar Association, that it might be possible to provide for pleas of guilty, both as to guilt and as to sentencing, and then allow appellate review only of contested sentences. I wonder if you would comment on that suggestion as an idea viable in itself, and also by way of eliminating the frivolous appeals that might occur after.

Judge FRANKEL. I think it's an interesting idea that is worth exploration. It opens up the huge subject of plea bargaining which many people have called sentence bargaining anyhow, which is essentially what it is when it works full-blown as it does in the State courts in my State, and it really opens very widely the rather considerable battle for and against plea or sentence bargaining.

I have a somewhat open mind on this subject, which means partly an empty mind. I have not reached a firm view on plea and sentence bargaining as a general proposition. For reasons of history, habit, and I think judgment by people who have preceded me, plea bargaining, in its best known forms, in its most sweeping form, doesn't exist on the court where I sit, so I don't have firsthand familiarity with it. I think, though, that it is not essential to make any legislative provision on the subject. I think if you had a plea and a sentence bargain, whether you have it in your statute or not, the appellate courts would very soon, at least I imagine they would, evolve a rule that in the absence of overreaching or some kind of misbehavior somewhere, you could not explicitly, knowingly, intelligently agree to a sentence and then attack it in the appellate court.

My inclination—but this is only a reflection of me and my limitations on this subject—would be to leave that to decision trial and error rather than to try to work it now into the statute. Courts, I think, will respond to the provision for appellate review by considering ways of limiting the amount of appeals that you get. But, as I said, that is not a view that I press passionately because I have no firm judgment on it.

I think I am almost through. I'm saying there will be an increase in the burden. I think, as many people have said before, that it is not an answer to keep the door closed on appeals involving sentencing questions, because if you review the dockets of our courts of appeals I think you will discover that they spend a rather considerable amount of their time concerning themselves with questions far less important than the array of questions that arise on sentencing. And if their business needs to be limited, I think it should not be limited by precluding this, which makes a very substantial claim for appellate attention. It may be that it should be limited by rethinking some of the business appellate courts are now doing, both in civil and criminal matters.

Specifically as to rule 35(c), it does not present an antidote to this problem of judicial burdens in any substantial proportion in any event. It contemplates three judges, lower district judges to be sure, but three judges using time, judicial time, reviewing sentences. I think in terms of hours of time, of judge time, you would get as

much time or more used under rule 35(c) than you would get by having appellate review in the normal way by courts of appeals. And the reason I put in those words "or more" runs this way. Normally or commonly an appeal involving a sentence would be a question on an appeal already presented to the appellate court, and I don't think it would lengthen its work in the usual case very much. The district judges are not geared up for appeals and they would have special sittings or special allotted times for considering review as panels, review of sentences.

I think we might well wind up using more judicial hours under rule 35(c) than under S. 716. So, as I say, I don't think, as between those two alternatives, the problem of burden on the judiciary is a very significant one either way.

I think, Mr. Chairman, that about concludes the things that I came prepared to say, quite specifically about the choice between the proposed criminal rule and the measure S. 716, but I am here to answer questions.

Mr. BLAKEY. Judge, there is one additional question I would like to ask you. Both in your Cincinnati Law Review article, which has already been incorporated in our record, and in your recent book on sentences, you call for a commission to undertake some examination of this area. I wonder if you think that the commission provided for in S. 1, in Section 3-13C1, which would have as its general duty the overseeing of the operation of the Federal Criminal Code, could perform the sentencing commission function that you call for in your book and that you address in the article.

Judge FRANKEL. There is not a priori reason why it could not take on that function. I contemplated when I wrote this, and I think it is somewhat visionary, in the first instance a kind of agency with rule-making power devoting itself quite explicitly and full-time to sentencing, both the research into the problems that I see and the evolution of legislative standards. Because, although I do believe in appellate review in the absence of other things, I think that as is true in a great many areas of our complex world, the need to fashion law is probably greater in this area than we can satisfactorily fill by judicial decision.

I think we need "legislative action," using legislative action in quotes in that sense. I have tended to feel that, in the nature of things, with the multiplicity of its concerns and for other reasons, Congress is not geared up to pay the kind of detailed attention to this that I believe it merits, and I think a body of well-qualified, scholarly, practical experts, devoting full attention to it, could supply that kind of rule-making function subject to whatever control, review, limitation the Congress or ultimately the courts might place on it.

Mr. BLAKEY. The experience of most commissions that we have had in this country has been that they have been terribly good at collecting and pulling together data from diverse sources, but they have not, on the whole, produced much original work of their own. I wonder if you think there is sufficient existing data, either in foreign countries or among the experience of district judges, to permit a commission to pull together and promulgate within a reasonable

length of time a fairly adequate body of jurisprudential rules for sentencing?

Judge FRANKEL. Well, I am certain there is a world of scholarly information and a world of comparative law to be studied in connection with this subject. I am not sure that the next step after the scholarship, the step of rulemaking, is hopeless. I think some of the agencies, certainly in their early enthusiastic years, have done important work through the fashioning of rules. I should say, because it's true, that my learning is limited on this subject. I will also confide to you that I will be going from here to some people in LEAA who have exhibited an interest in this subject, to talk about research and legislative possibilities in this area on which, I try to say in my book, I have a fairly open mind.

Mr. BLAKEY. Thank you, Judge.

Senator HRUSKA. Judge Frankel, my bill authorizes the appellate review of criminal sentences and it employs the word "excessive" as a basis upon which to proceed. Would you like to comment on that approach?

Judge FRANKEL. I suspect that, at this time in our learning about sentencing, it is an ample approach; that is to say, it is a broad word that I think the bill contemplates would have to be filled with content by the decision of the appellate courts. I think it is a word that would address itself to the problems of disparity, presumably mainly in one direction, and could readily begin to address itself to problems which perhaps are more fundamental in the end, of the permissible purposes of sentences.

If you look at the English experience, for example, excessiveness has to be gauged in terms of what the sentence of the particular man is supposed to be driving at. In the English practice they have "deterrent sentences," which may tend to be long when they are meant to give loud warnings to people, and they talk about "individualized sentences," which are meant to be reformatory or rehabilitative, and where you have quite different considerations operating.

I said deterrent sentences may tend to be long and I should also say, because it's not a simple subject, that a rehabilitative sentence may tend, in particular instances, to be even longer because you need time to attend to the defendant's needs.

I think all of the problems of sentencing on which rules and guidelines need to be created could begin to be approached, certainly, through the conception of excessiveness, and at least I would be happy to begin with that as the basis for appellate courts' operations.

Senator HRUSKA. Now, again, in the case of the bill which I introduced, it would be applicable to any sentence, whereas rule 35 limits the application of that rule to any sentence of 2 years or more. Would you have any comment on that difference?

Judge FRANKEL. I would prefer to see review available for any kind of sentence. I would prefer, I would say, your approach to this kind of problem.

A year in prison is a long time. If somebody has been in what the appellate court would come to regard as an unlawful way sentenced

to as much as a year in prison, he should have access to review for the same reason I have been urging review generally over sentences. At least in the beginning I would not want to see any lower limit on the sentences that could be reviewed.

Senator HRUSKA. There would be some bearing, wouldn't there, on the recent ruling of the Supreme Court that counsel is required for any offense, whether it is misdemeanor or felony. For example, it is serious to a man that he would be sent to jail for 6 months. And if it is serious enough to warrant the application of the rule of adequate legal counsel, certainly there can be a good case made for saying a year is also a long time, and could be appealable, or even 6 months.

Judge FRANKEL. I think absolutely the whole tendency of our law is to recognize that being locked up is a very drastic kind of experience. A man ought to have a chance to complain about that regardless of the period.

Mr. BLAKEY. Would you give him a chance to complain, Judge, about the conditions of probation, assuming he was not sentenced to prison?

Judge FRANKEL. Yes; I think whether we have legislation or not, one of these days we are liable to see a growing body of case law about the conditions of probation. Sometimes, perhaps reflecting the sense of omniscience that I mentioned slightly ironically before, judges impose some wild conditions of probation on people, some of which—I won't mention any particular ones—have appeared to be unconstitutional, infringing on a man's very intimate private life, religion, and matters of that sort.

I don't see any reason to limit it only by the Constitution. I think the fairness and propriety of probation conditions could be very important. It should be subject to scrutiny on appeal.

Mr. BLAKEY. Thank you very much.

Senator HRUSKA. Thank you very much, Your Honor. We are pleased that you would take time to come here and be with us.

Judge FRANKEL. I appreciate the honor of being here.

Senator HRUSKA. The hearings are recessed.

[Whereupon, at 12:06 p.m., the hearing was recessed.]

APPENDIX

[MEMORANDUM DECISIONS, Cite as 466 F.2d (6th Cir. (1972))]

United States Court of Appeals, Sixth Circuit

Dec. 17, 1971

No. 71-1563

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

PHILIP WILLIAM MCKINNEY, DEFENDANT-APPELLANT

United States Court of Appeals, Sixth Circuit

June 15, 1972

No. 72-1480

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

PHILIP WILLIAM MCKINNEY, DEFENDANT-APPELLANT

Bertrand B. Pogrebin, Mineola, N.Y., for defendant-appellant; Rains, Pogrebin & Scher, Mineola, N.Y., Jack D. Young, Kimble, Schapiro, Stevens, Harcha & Young, Portsmouth, Ohio, on brief.

James F. Cook, Asst. U.S. Atty., Lexington, Ky., for plaintiff-appellee; Eugene E. Siler, Jr., U.S. Atty., Lexington, Ky., on brief.

Before PHILLIPS, Chief Judge, and WEICK and CELEBREZZE, Circuit Judges.

ORDER

In the previous appeal of this case we affirmed the judgment of the District Court but remanded for the purpose of reconsidering the five-year sentence which was the maximum sentence provided by statute, because we were of the view that it was excessive and out of proportion to the offense. We retained jurisdiction to consider the sentence imposed upon the remand. *United States v. McKinney*, 427 F.2d 449 (6th Cir. 1970).

Upon remand, the District Court imposed the same maximum sentence. The Court, however, did not have the benefit of our subsequent decision in *United States v. Daniels*, 446 F.2d 967 (6th Cir. 1971).

We again remand for further consideration of the sentence in the light of *Daniels*.

Defendant was convicted in the United States District Court for the Eastern District of Kentucky, Bernard T. Moynahan, Jr., Chief Judge, of refusing induction into armed forces, and he appealed. After two remands, 427 F.2d 449 and 466 F.2d 1403 the Court of Appeals held that where defendant was a young married man with an infant son, and had no criminal record, and his good reputation in community where he resided was attested to by a number of persons and was uncontroverted, maximum sentence of five years imposed upon him by district court and district court's persistent adherence thereto on refusal to change sentence after two remands on appeal constituted a gross abuse of discretion as well as a violation of appellate mandates, and Court of Appeals would order that sentence be modified and reduced to one year and would also order that defendant be released from custody as soon as he had served one year under original sentence as modified, allowing credit for statutory allowances.

Order accordingly.

Criminal Law ⇐ 1138, 1187, 1192

Where defendant, who was convicted of refusing induction into armed forces, was a young married man with an infant son, and had no criminal record, and his good reputation in community where he resided was attested to by a number of persons and was uncontroverted, maximum sentence of five years imposed upon him by district court and district court's persistent adherence thereto on refusal to change sentence after two remands on appeal constituted a gross abuse of discretion as well as a violation of appellate mandates, and Court of Appeals would order that sentence be modified and reduced to one year and would also order that defendant be released from custody as soon as he had served one year under original sentence as modified, allowing credit for statutory allowances.

Bertrand B. Pogrebin, Rains, Pogrebin & Scher, Mineola, N.Y., Jack D. Young, Portsmouth, Ohio, for defendant-appellant.

Eugene E. Siler, U.S. Atty., James F. Cook, Asst. U.S. Atty., Lexington, Ky., for plaintiff-appellee.

Before PHILLIPS, Chief Judge, and WEICK and CELEBREZZE, Circuit Judges.

ORDER

We are now required to consider the third appeal of this case. In the first appeal, we affirmed the judgment of conviction but remanded for reconsideration of the maximum sentence of five years imposed on the defendant upon his conviction for refusing to be inducted into the armed forces. The reason for the remand was our finding that the sentence imposed was excessive. *United States v. McKinney*, 427 F.2d 449 (6th Cir. 1970). Upon the remand, the District Judge adhered to his sentence and the defendant again appealed therefrom to this Court. The District Court denied bail pending appeal. Upon consideration of the arguments and briefs in the second appeal, we were still of the view that the sentence was excessive and we remanded again for reconsideration of the sentence in the light of *United States v. Daniels*, 446 F.2d 967 (6th Cir. 1971). *United States v. McKinney*, 466 F.2d 1403 (6th Cir.). Upon the second remand, the District Judge for the second time, refused to reduce the sentence and the defendant appealed. He has been serving his sentence in prison since June 15, 1971.

It is our opinion that the five-year sentence imposed in accordance with the practice of the District Judge was not an individualized sentence, as required by *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). The Court also took into account that defendant was responsible for delaying his induction in the Induction Center, and for delaying his trial and imprisonment by filing Motions and taking an appeal. Furthermore, the District Court seemed to resent our remanding for reconsideration of the sentence. A goodly portion of his remarks on the remands were devoted to a discussion of appellate review of sentences. It was the thesis of the District Court in effect, that he had absolute, uncontrollable and unreviewable discretion to impose any sentence he saw fit to impose so long as it did not exceed the statutory limit, and that an appellate court had no jurisdiction to do anything about it. He even mentioned that the heavier sentences imposed in his district brought fewer cases of Selective Service violation into court than in other districts in the Circuit where lighter sentences were imposed.

It is a well known fact that disparity in sentencing causes considerable resentment among prison inmates and it is made worse when the disparity exists in the same Circuit.

The defendant is a young married man with an infant son. He has no criminal record. His good reputation in the community where he resides was attested to by a number of persons and was uncontroverted.

Our problems with the sentencing procedures of the District Court for the Eastern District of Kentucky were again succinctly stated in the recent case of *United States v. Charles*, 460 F.2d 1093 (6th Cir. dec. May 26, 1972). In remanding for reconsideration of the maximum sentence imposed in that case, we said:

"Yet, as we have had occasion to point out in the past, the Courts in one District within this Circuit have persistently disregarded this individual sentencing approach with respect to one category of offenses—violations of the

Selective Service laws. With very rare exceptions, the judges in the Eastern District of Kentucky have consistently meted out five year prison sentences to draft offenders regardless of the circumstances of the particular offender. We have had occasion to criticize this practice in the past. *United States v. Daniels*, 429 F.2d 1273 (6th Cir. 1970) ; *United States v. Daniels*, 446 F.2d 967 (6th Cir. 1971) ; *United States v. McKinney*, 427 F.2d 449 (6th Cir. 1970) ; *United States v. McKinney*, 466 F.2d 1403 (6th Cir. #71-1563, decided December 17, 1971) ; we have not changed our policy on this matter."

The maximum sentence imposed by the District Judge in the present case and his persistent adherence thereto and refusal to change the same in the two remands constituted a gross abuse of discretion as well as a violation of our mandates.

And now coming to render the judgment which the District Court should have rendered, it is ordered, adjudged and decreed that the five-year sentence imposed by the District Court be modified and reduced to one year, and as soon as defendant has served one year under the original sentence as modified, allowing credit for statutory allowances, it is ordered that he shall be forthwith released from custody.

Entered by Order of the Court.

[*United States v. Daniels*, 446 F. 2d 967 (1971)]

United States Court of Appeals, Sixth Circuit

Aug. 3, 1971

No. 71-1136

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

HARRY WILLIAM DANIELS, JR., DEFENDANT-APPELLANT

Rehearing En Banc Denied

Aug. 18, 1971

Defendant was convicted before the United States District Court for the Eastern District of Kentucky, Mac Swinford, J., of failing to comply with order of local selective service board to report for instruction to commence with civilian employment, as alternate service, and he appealed. The Court of Appeals, 429 F.2d 1273, affirmed, but remanded for reconsideration of five-year sentence. On remand, the District Court refused to reduce or suspend the original sentence. On appeal after remand, the Court of Appeals, Celebrezze, Circuit Judge, held that trial court, in imposing five-year sentence, as such court allegedly regularly did, upon defendant, who had been motivated to commit offense solely for purpose of adhering to his religious beliefs, was of "good character" and of "apparent model behavior," and was willing to serve in civilian capacity if required to do so under judicial orders, had defied Congress' implied legislative will to impose lesser sentence if appropriate.

Remanded with instructions.

1. Criminal Law ⇨ 1147

Though trial court is permitted broad latitude in discharging its duty to impose proper sentence, exercise of such discretion is subject to appellate scrutiny under limited circumstances, such as reliance by sentencing court on improper factors or failure of sentencing court to evaluate available information in light of facts relevant to sentencing.

2. Armed Services ⇨ 40.1(1)

Trial court, in imposing five-year sentence, as such court allegedly regularly did, for offense of failing to comply with order of local selective service board to report for instructions to commence with civilian employment, as alternative service, upon defendant, who had been motivated to commit such offense solely for purpose of adhering to his religious beliefs, was of "good character" and of "apparent model behavior," and was willing to serve in civilian capacity if required to do so under judicial orders, had defied Congress' implied legislative

will to impose lesser sentence if appropriate. Military Selective Service Act of 1967, § 12, U.S.C.A. App. § 462.

Richard R. Slukich, Covington, Ky. (Court appointed), for defendant-appellant.

J. T. Frankenberger, Lexington, Ky., for plaintiff-appellee; Eugene E. Siler, Jr., U.S. Atty., James F. Cook, Asst. U.S. Atty., Lexington, Ky., on brief.

Before PHILLIPS, Chief Judge, and EDWARDS and CEBREZZE, Circuit Judges.

CEBREZZE, Circuit Judge.

This is the second time this case has come before this Court. In July, 1970, we affirmed the conviction of Appellant—a member of the Jehovah's witness faith and a conscientious objector—for failing to comply with an order of his local selective service board to report to said board for instructions to commence with civilian employment, as alternate service, in violation of 50 U.S.C. App. § 462. *United States v. Daniels*, 429 F.2d 1273 (6th Cir. 1970). In affirming Appellant's conviction, however, we remanded this cause to the District Court to permit reconsideration of the five year sentence of imprisonment that the District Court imposed upon the Appellant. *United States v. Daniels*, *supra* at 1273.

Our remand order was based in large part on the peculiar facts of the instant case: Appellant is a young man whose sole motivation for refusing to obey an order of his local selective service board was a devout adherence to his religious beliefs.¹ Further, he is of "good character"² and apparently stood willing at all times to comply with a judicial order to present himself for civilian employment as required by federal law.³ And finally, other young men in different districts within our jurisdiction were not being disciplined by imprisonment for their religious beliefs so long as they were willing to comply with a judicial order to do the exact conscientious objector work which they had refused to perform when ordered by the local draft board. *United States v. Daniels*, *supra*. See *United States v. Griffin*, 434 F.2d 740, 742 (6th Cir. 1970). *Cf. United States v. Dudley*, 436 F.2d 1057 (6th Cir. 1971).

Upon remand, the District Court refused to reduce or suspend its original five year sentence of Appellant. Indeed, the trial court judge observed that for the over thirty years that he had been on the federal bench he has "felt that in cases of this kind a refusal to obey an order of a local draft board] that * * those who violate that order] deserve a five year sentence; and I think almost without exception I have given a five year sentence * * *."⁴ In so holding, the District Court noted that the law Appellant violated "strikes at the very foundation and fundamentals * * * of our whole governmental system." Finally, the District Court indicated that it was "qualified by experience, temperament [and] knowledge of law * * * in giving this sentence [of five years]" and that the Court used such experience and the record of this case in determining the challenged sentence. This appeal followed.⁵

¹ This fact was conceded by Government counsel in oral argument before our Court, and, in any event, is implicit in the language used by the District Court in its initial sentencing of Appellant.

² The District Court stated that the presentence report revealed that the Appellant was "a very competent and well-behaved person and a good citizen" and "of apparent model behavior." Moreover, the District Court agreed with Appellant's counsels observations that Appellant had "proved himself to be an utmost sincere and conscientious and very honest individual * * * [with] an 'excellent' record in his 'high school' and 'community'."

³ Prior to trial, Appellant's attorney fully informed the District Court and Government counsel that Appellant's religious beliefs precluded him from obeying an order of a local selective service board, but that Appellant would in all probability comply with a judicial order to do the exact same work required by law. Government counsel conceded on oral argument that he understood that Appellant would accept a judicial order to do civilian employment on probation.

⁴ At oral argument, counsel for the United States stated, "Your Honor[s], I have never seen a sentence in a Selective Service case of less than five years, in the Eastern District of Kentucky."

⁵ Prior to oral argument in this second appeal, this Court requested that the District Court transmit, under seal, the pre-sentence report upon which the District Court may have relied in sentencing Appellant. The District Court refused. While we seriously question the right of a lower court judge to restrict the "supervisory control of the District Courts by the Courts of Appeals [where such control] is necessary to proper judicial administration in the federal system," *La Bay v. Howes Leather Co.*, 352 F.S. 249, 259-260, 77 S. Ct. 309, 315, 1 L.Ed.2d 290 (1957), a review of the record in this case reveals that the District Court obviated the necessity for such a report by its extended remarks about Appellant's background and character. See Note 2. Hence, there is no need to rule on whether we may compel a District Court to forward, under seal, pre-sentence reports where we believe them to be necessary for proper appellate review.

The sole issue on appeal is whether the District Court properly discharged its duty to impose an appropriate sentence. *Williams v. Oklahoma*, 358 U.S. 576, 585, 79 S.Ct. 421, 3 L.Ed.2d 516 (1959). See *Livers v. United States*, 185 F.2d 807, 809 (6th Cir. 1950).

Before focusing our attention on the appropriateness of the instant sentence, we must consider the substantial body of federal precedents governing the scope of appellate review of sentences. In general, the severity or duration of punishment imposed by a trial court is not subject to modification where the sentence imposed is within the requisite legislative limits. *Gore v. United States*, 357 U.S. 386, 393, 78 S.Ct. 1280, 2 L.Ed.2d 1405 (1958); *Blockburger v. United States*, 284 U.S. 299, 305, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The process of sentencing an offender, however, is not wholly immunized from judicial review solely because the sentence imposed upon the offender falls somewhere within certain statutory limits. *Williams v. Oklahoma*, 358 U.S. 576, 79 S.Ct. 421, 3 L.Ed.2d 516 (1959); *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949); *Townsend v. Burke*, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948). See *Scott v. United States*, 136 U.S.App.D.C. 377, 419 F.2d 264, 266-267 (1969).

In *Townsend v. Burke*, *supra*, the United States Supreme Court held that an appellate court may scrutinize the sentencing process to insure that the trial judge has based his decision on reliable information.

In *Williams v. New York*, *supra*, decided only months after *Townsend v. Burke*, the United States Supreme Court praised the modern penological philosophy of "individualizing sentences" and discussed the twin responsibility of the trial judge with regard to a criminal offender: first, to possess the fullest possible information about an offender; and second, to select a sentence based upon those factors appropriate to the "important goals of criminal jurisprudence." In so doing, the Court stated:

"A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. * * *

"Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. *People v. Johnson*, 252 N.Y. 387, 392, 169 N.E. 619, [621]. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender." 337 U.S. at 247, 69 S.Ct. at 1083.

And in *Williams v. Oklahoma*, *supra*, the United States Supreme Court, further explained the breadth of appropriate judicial review of the sentencing process in a case involving the sentencing of a kidnapper who had shot and killed victim. It held:

"In discharging his duty of imposing a proper sentence, the sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime." 358 U.S. at 585, 79 S.Ct. at 427.

[1] The above Supreme Court precedents establish that while the District Court is permitted broad latitude in discharging its "duty to impose a proper sentence," the exercise of the District Court's discretion will be subject to appellate scrutiny under limited circumstances, such as: the reliance by the sentencing court on improper factors or the failure of the sentencing court to "evaluat[e] the available information in light of the facts relevant to sentencing." *Scott v. United States*, *supra*, 419 F. 2d at 266.

This Court has fashioned similar standards for the appellate review of the substantive aspects of the trial court's sentencing procedures. In general, we have permitted the trial judge broad discretion in sentencing a criminal defendant without specific regard to the severity of the sentence imposed so long as the sentence was within the permissible statutory range. *United States v. Dudley*, 436 F.2d 1057 (6th Cir. 1971); *United States v. Jackson*, 422 F.2d 975, 978 (6th Cir. 1970); *Costner v. United States*, 271 F.2d 261, 263 (6th Cir. 1959). But see *United States v. Daniels*, 429 F.2d 1273 (6th Cir. 1970); *United States v. Griffin*, 434 F.2d 740, 742 (6th Cir. 1970).

On the other hand, we and other courts have approved of remanding for resentencing in cases where it appeared that a trial judge had improperly con-

sidered certain factors in sentencing, *see* *United States v. Latimer*, 415 F.2d 1288 (6th Cir. 1969); *United States v. Stubblefield*, 408 F.2d 309 (6th Cir. 1969); *Marano v. United States*, 374 F.2d 583 (1st Cir. 1967); improperly relied upon certain false information, *Townsend v. Burke*, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948); *Smith v. United States*, 223 F.2d 750 (5th Cir. 1955), or grossly abused his discretion by failing to evaluate the relevant information before him with due regard for the factors appropriate to sentencing. *Yates v. United States*, 356 U.S. 363, 366-367, 78 S.Ct. 766, 2 L.Ed.2d 837 (1958); *United States v. McKinney*, 427 F.2d 449, 455 (6th Cir. 1970); *United States v. West Coast News Co.*, 357 F.2d 855, 865 (6th Cir. 1966) reversed on other grounds sub nom., *Aday v. United States*, 388 U.S. 447, 87 S.Ct. 2095, 18 L.Ed.2d 1309 (1967); *United States v. Moody*, 371 F.2d 688, 693-94 (6th Cir. 1967); *United States v. Wiley*, 278 F.2d 500, 503 (7th Cir. 1960); *see* *Livers v. United States*, 185 F.2d 807, 809 (6th Cir. 1950).

[2] Applying the above stated principles to the facts of this case we are gravely concerned—in at least three respects—about the manner in which the District Court exercised its discretion in discharging its duty to impose an appropriate sentence.

First, we are seriously perturbed about the trial judge's avowal that since 1938 or 1939, his court has—to the best of his memory—sentenced to five years in the penitentiary every young man who has refused to obey an order of a draft board. That statement, taken along with the observations of the United States attorney at oral argument,⁶ suggests a general practice in at least one federal district in Kentucky of imposing a sentence without particular reference to the circumstances surrounding the commission of the crime or of the background of the criminal defendant.

A trial court which fashions an inflexible practice in sentencing contradicts the judicially approved policy in favor of "individualizing sentences." *Williams v. New York*, 337 U.S. at 248, 69 S.Ct. 1079. Moreover, such an inflexible sentencing practice is incompatible with the United States Supreme Court's declaration in *Williams v. Oklahoma*, 358 U.S. at 585, 79 S.Ct. at 427 that:

"Necessarily, the exercise of a sound discretion in such a case required consideration of all the circumstances of the crime for '[t]he belief no longer prevails that every offense in a like legal category calls for an identical punishment [without regard to the past life and habits of a particular offender]' *Williams v. [State of] New York*, *supra* [337 U.S.] at [page] 247, 69, S.Ct. at [page] 1083. In discharging his duty of imposing a proper sentence, the sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime."

We are unable to understand how the trial judge could have fairly considered all of the circumstances surrounding the commission of the crime and the past life and habits of the Appellant that he is obliged to consider and impose the identical punishment he has been handing down for thirty years in "cases of this kind." *Williams v. Oklahoma*, *supra*, *Williams v. New York*, *supra*.

Second, the District Court may not wholly justify its seemingly mechanical imposition of five year sentences on all those who violate the provisions of 50 U.S.C. App. § 462, by stating that the law violated is "a very serious law that strikes at the very foundations and fundamentals *** of our whole governmental system." The United States Congress has expressly provided that offenders of 50 U.S.C. App. § 462 shall upon conviction "be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment. ***" The United States Congress did not provide that every violation of 50 U.S.C. App. § 462 shall be punishable by a term of imprisonment of no less than five years. Hence, 50 U.S.C. App. 462 is an express legislative sanction of the practice of meting out sentences substantially less than five years in prison for wilful and knowing refusals to obey an order of a local selective service board in situations where there are appropriate mitigating circumstances.

In the instant case, the Appellant is conceded to have been motivated to commit the offense charged solely in order to adhere to his religious beliefs. He was found to be of "good character" and of "apparent model behavior." The crime he committed was not an act of violence. It did not invade the pri-

⁶ See note 4.

vacy of others or endanger the property or person of others. The Appellant was willing to serve his country in a civilian capacity if required to do so under judicial orders. We believe that under the mitigating circumstances present here the District Court's mechanical sentencing of the Appellant to five years in the penitentiary defies the United States Congress' implied legislative will to impose a lesser sentence where appropriate.

Third, we are disturbed by the District Court's failure to conceive of the sentencing procedure in terms of the modern penological philosophy praised by the United States Supreme Court in *Williams v. New York*, *supra*. In *Williams v. New York*, *supra* at 248 n13, 69 S.Ct. 1079, the United States Supreme Court cited with approval certain basic considerations to be used in determining an appropriate sentence: (a) the reformation of the offender, (b) the protection of society, (c) the disciplining of the wrongdoer, and (d) the deterrence of others from committing like offenses.

The imprisonment of Appellant can hardly be deemed helpful in reforming a young man of concededly "good character" and "model behavior." Imprisonment cannot serve as protection for society because the immediate release of Appellant poses no risk to society's safety. Moreover, disciplining or punishing the Appellant by imprisonment would seem to be an inappropriate rationale for sentencing where, as here, a young man has devoutly adhered to his religious beliefs without impeding the rights of others. Finally, under the limited factual circumstances of this case, the issuance of an order probating the Appellant subject to his performance of the identical work demanded of him by the Selective Service is not the kind of sentencing which would induce widespread disobedience of the orders of local Selective Service boards. *Cf. Gillette v. United States*, 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d (1971). In summary, there is no evidence in the record that the District Court evaluated the information in the record in the light of any of the basic factors relevant to the sentencing of a criminal offender.

In our judgment, the District Court pursuant to our first remand of this case failed to exercise its sound discretion, but instead sought merely to justify its original sentence which it had been imposing as a "minimum" sentence in similar cases for over thirty years. *Yates v. United States*, 356 U.S. 363, 366-367, 78 S.Ct. 766, 2 L.Ed.2d 837 (1958). We find that under the circumstances of this case the District Court plainly failed to discharge its duty to impose a proper sentence when it sentenced Appellant to five years in the penitentiary.

This case is remanded with instructions to enter the following order:

"IT IS ADJUDGED that the defendant is guilty as charged and convicted.

"IT IS ADJUDGED the imposition of sentence is hereby suspended and the defendant is placed on probation for a period of Twenty-five (25) months,

"IT IS FURTHER ORDERED, that during the twenty-five month period of probation the defendant shall perform civilian work contributing to the maintenance of the national health, safety or interest for a period of twenty-four (24) consecutive months less the time already served in confinement as determined by the Probation Department.

"IT IS FURTHER ORDERED, that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the Court for violation of Court's orders."

So ordered.

Before PHILLIPS, Chief Judge, and WEICK, EDWARDS, CELEBREEZE, PECK, MCCREE, BROOKS, MILLER, and KENT, Circuit Judges.

ORDER

Pursuant to Rule 3(b), Rules of the United States Court of Appeals for the Sixth Circuit, a suggestion for a rehearing in banc has been made by a Judge of this Court in active service on his own motion.

Upon due consideration, less than a majority of the Judges of this Court who are in regular active service having favored ordering consideration in banc,

It is ordered that rehearing in banc be, and it is hereby denied.

It is further order that the mandate heretofore stayed be issued forthwith.

CREATING A NEW FEDERAL CRIMINAL CODE

(By Roman L. Hruska)¹

Now that the Department of Justice's recommendations have been introduced in the form of an Administration version of a new Federal Criminal Code, the Congress will move to consider both this bill and one put in the hopper earlier in the present congressional session. The proposals before Congress build on the report and recommendations of the National Commission on Reform of Federal Criminal Laws.

In 1966 Congress created the National Commission on Reform of Federal Criminal Laws and charged it with the duty of making a "full and complete review and study of the statutory and case law of the United States which constitutes the federal system of criminal justice for the purpose of formulating and recommending to the Congress legislation which would improve the federal system of criminal justice." Along with Senators Sam J. Ervin, Jr., and John L. McClellan, I was privileged to serve on the national commission, called after its distinguished chairman, former Gov. Edmund G. Brown of California, the Brown commission.

The product of nearly three years of deliberation by the commission, its advisory committee, consultants, and staff, the final report and recommendations of the commission were submitted to the Congress and the President on January 7, 1971. These recommendations and the commission's study draft of a new Federal Criminal Code were designed to serve as a preliminary basis on which to build a criminal law codification effort. About a week later President Nixon issued a statement commending the Brown commission for its labors and directing the Department of Justice to establish a special team within the department to work full-time on the recommendations of the commission with a view toward legislation to recodify Title 18 of the United States Code. In February of 1971 the Senate Subcommittee on Criminal Laws and Procedures, under the chairmanship of Senator McClellan, began an ambitious set of hearings and studies on the recommendations of the commission. These continued over the course of the Ninety-second Congress and culminated in the introduction of S.1—the massive Criminal Justice Codification, Revision, and Reform Act of 1973—on January 4 of the year. Along with Senator Ervin, I joined Senator McClellan in cosponsoring S. 1.

Over the course of the last two years, the Department of Justice also has labored diligently, along with representatives of other interested federal agencies, in the effort to create a new Federal Criminal Code. In his sixth state of the union message on crime on March 14 of this year, President Nixon announced his imminent submission of legislation to revise, reform, and codify existing federal criminal laws.

On March 27 I introduced S. 1400—the Criminal Code Reform Act of 1973—which the Department of Justice had drafted. That bill and S. 1 will now provide the two major legislative items on which the Senate will focus in the coming months as it moves in the direction of creating a new Federal Criminal Code.

S. 1 represents the diligent and unsparing efforts of Senator McClellan and others too numerous to mention, and the bill I introduced is the product of extensive and intensive effort by the Nixon Administration. As is to be expected, however, there are a number of differences between S. 1 and S. 1400—some minor, others more substantial—but even a cursory comparison of them demonstrates their essential similarity of conception and execution. Whatever the differences, it must be emphasized that neither bill is partisan. The revision, reform, and codification of the federal criminal law is universally conceded to be imperative. For too long now our efforts to protect life, property, human rights, and domestic tranquility have been hobbled by the most fundamental element of the criminal justice system, the law itself.

In broad strokes, what are some of the more salient features of the proposed Criminal Code Reform Act?

¹ A United States Senator from Nebraska since 1954, Roman L. Hruska earned his law degree at Creighton University in 1929 and served in the House of Representatives before his election to the Senate. He is the ranking Republican member of the Senate Judiciary Committee.

While numerous individual criminal statutes, particularly some of the more recent ones, have been of great value, a great number have been of little or no use, and as a body of law, existing provisions have been deficient. S. 1400 faces this problem squarely by suggesting a rational, integrated code that is both workable and responsive to the demands of our highly complex twentieth century society.

FEDERAL CRIMINAL CODE HAS THREE PARTS

S. 1400 is structured as an amendment to title 18 of the United States Code (Crimes and Criminal Procedure). Title I of the bill consists of a thorough revision of substantive federal criminal law and its codification into an integrated Federal Criminal Code. Title II provides necessary conforming amendments to the entire United States Code. The new Federal Criminal Code proposed by Title I is divided into three parts: the first part containing general provisions and principles; the second, definitions of federal offenses; the third, provisions for sentencing.

Part I of Title I, setting forth general provisions and principles of federal criminal jurisdiction, culpability, complicity, and defenses, contains a number of significant innovations. Foremost among these is a new approach to the treatment of federal criminal jurisdiction—treating as a federal offense the basic criminal misconduct that occurs under circumstances giving rise to federal jurisdiction rather than regarding the offense in terms of an affront to some federal jurisdictional factor, such as the mails.

Among the numerous advantages to this approach are clarity of drafting, uniformity of interpretation, and consolidation, of numerous existing offenses that entail basically the same type of conduct. For example, the approximately seventy theft offenses under current law—each written in a different fashion to cover the taking of various kinds of property in different jurisdictional situations—have been replaced by five general sections. Almost eighty forgery, counterfeiting, and related offenses have been recodified in three sections. About fifty statutes on perjury and false statements have been consolidated into four sections. Approximately seventy arson and property destruction offenses have been reduced to four.

Similar advantages result from the bill's treatment of culpability, the mental element of an offense. Instead of the seventy-nine undefined different terms or combination of terms now found in Title 18, S. 1400 uses four defined terms (intentionally, knowingly, recklessly, and negligently) to describe the requisite state of mind.

Another major innovation reflected in Part I of Title I is the codification, for the first time in federal criminal law, of general defenses to prosecution. Not only does codification of defenses comport with the bill's over-all goal of setting forth in one place all major aspects of substantive federal criminal law, it also permits clarification of areas in which the law is confused, supplies uniform federal standards in the area for the first time, and would provide congressional support for the better-reasoned judicial interpretations under existing law.

HOW THE BILL TREATS "INSANITY DEFENSE"

Probably the most significant feature of the bill's chapter on defenses is its treatment of the "insanity" defense. Under Section 502, a mental disease or defect will not absolve a person of guilt unless it deprives him of the intent or knowledge required for commission of the offense charged. The purpose of this formulation, which has considerable support in psychiatric and legal circles, is to shift the inquiry from "Was he able to control his conduct?" to "Did he know what he was doing, and, if so, does he require treatment or does he deserve imprisonment?" This innovative approach to the problem of the relationship between mental illness and crime could go far to assure better protection for society while at the same time providing meaningful disposition for the mentally diseased person.

Part II of Title I defines in one place, for the first time since 1870, all federal felonies, as well as certain related federal offenses of a less serious character. As is true of Part I, Part II encompasses a variety of essential reforms. Offenses and, in appropriate instances, special defenses are defined in simple, concise, and straightforward terms.

Provisions of existing law found to be obsolete or unusable have been eliminated—for examples, 18 U.S.C. § 1651, operating a pirate ship on behalf of a "foreign prince"; 18 U.S.C. § 45, detaining a United States carrier pigeon; 18 U.S.C. § 2198, seducing a female steamship passenger. Loopholes in existing law have been closed—for example, Section 1731, theft of union welfare funds. New offenses have been created where necessary—Section 1862, leading organized crime. Of course, when existing law has proved satisfactory and existing statutory language has received favorable case law interpretation, the law and the operative language have been retained.

PENALTIES DEPEND ON SERIOUSNESS OF OFFENSE

Reforms are also suggested with respect to penalties: anomalies have been obviated, and penal sanctions have been provided that appropriately reflect the seriousness of the offense by contemporary standards. In some instances, the result is higher potential penalties (the penalty for arson has been raised from five to fifteen years in prison); in others the potential penalties have been reduced (impersonation of a foreign official carries a three rather than a ten-year prison term). The penalty provisions are intended to reflect current judgments as to the seriousness of different offenses. This is particularly true with respect to the death penalty, which would be provided only for particularly heinous criminal conduct, such as wartime treason, sabotage, or espionage and murder in certain types of situations (Section 2401).

As with the definitions of an offense, the circumstances giving rise to federal jurisdiction over an offense (the jurisdictional bases) are spelled out in simple, concise language. Far more important however, is the discriminating approach to federal jurisdiction. It emphatically rejects the notion of drastic encroachment on areas of state sovereignty, whether by proliferating the number of jurisdictional bases or by radically expanding their applicability. Indeed, jurisdiction has been contracted in areas in which the states have demonstrated little need for assistance in effectively protecting their citizens.

Although the bill reflects a modest extension of federal jurisdiction, extreme care has been taken to limit expansion to areas of compelling federal interest not adequately dealt with now. For example, under present law traveling in interstate commerce to bribe a witness in a state court proceeding is a federal crime (18 U.S.C. § 1952), but traveling in interstate commerce to threaten or intimidate the witness is not, even if the intimidation takes the form of murder. Obviously, the federal interest of assisting a state to safeguard the integrity of its judicial processes is the same in each case. This being so, an extension of federal jurisdiction is plainly warranted.

It is anomalous situations of this kind that have prompted the moderate expansion of federal jurisdiction reflected in S. 1400. And, of course, the existence of federal jurisdiction does not require that it be exercised blindly. As they have in the past, federal prosecutors, under guidelines issued by the Department of Justice, can be expected to continue to exercise discretion by deferring to local authorities in cases primarily of state concern. The bill encourages the sound exercise of prosecutorial discretion in this area by requiring the filing of annual reports by the department to bring to the attention of Congress the number of cases brought under each of the various jurisdictional bases (Section 211).

OFFENSES ARE CLASSIFIED INTO EIGHT CATEGORIES

The reforms wrought by Parts I and II of Title I would have little practical significance if they were unaccompanied by a realistic approach to the myriad problems that arise once a person has been convicted of a federal offense. Existing law provides in Title 18 alone for eighteen different terms of imprisonment and fourteen different fines, often with no discernible relationship between the possible term of imprisonment or the size of the fine. Part III of the bill, therefore, replaces existing anomalies with a rational system whereby offenses are classified into eight categories for purposes of imprisonment and fines.

The bill provides for imposition in appropriate cases of a "notice sanction" requiring a corporate or individual defrauder to give notice of the conviction to those innocent victims who may be entitled to file civil claims for damages

(Section 2004). It also includes mandatory minimum prison terms for persons using dangerous weapons in the course of a crime (Section 1813), traffickers in hard narcotics (Section 1821), and organized crime leaders (Section 1862).

To reduce the possibility of unwarranted disparities in sentencing, E. 1400 sets forth criteria for the imposition of sentence, including in Section 2401 detailed criteria for imposition of the death penalty. Another significant change suggested in this area is the inclusion of a parole component in all prison sentences to ensure that control will be maintained over hardened criminals after their release from confinement.

As even this limited review of its more significant features makes clear, the Criminal Code Reform Act of 1973 has an enormous potential for enhancing our federal criminal law. S. 1400 can be regarded as a truly momentous advance toward fulfillment of one of the most basic demands of our society, justice in the administration of the criminal law—for justice in the administration of the criminal law inevitably rests on the justice of the criminal law.

When S. 1 was introduced, Senator McClellan and I both indicated that we were not prepared to provide a blanket endorsement of its provisions. That bill was viewed only as a preliminary work product. While S. 1400 is a monumental effort by the Administration, including the Department of Justice and other participating departments and agencies, I recognize that it is only a starting point for the Congress. There is much room for debate on S. 1400 and S. 1. I shall likely have reservations on certain provisions of the Administration's bill. For example, there is no provision in it for the appellate review of criminal sentences, as recommended by the final report of the National Commission. Moreover, this concept is not even recognized to the extent that it is possible under current law with respect to dangerous special offenders, as in 18 U.S.C. § 3576, added by the Organized Crime Control Act of 1970. The lack of authority and machinery for the review of unreasonable sentences has troubled me for many years. I hope that the bill that eventually emerges from Congress will contain some provision in this regard.

I firmly believe that the project of rewriting Title 18 must be approached with a healthy spirit of compromise. The legislation the Senate will pass will have provisions to which I may object or about which I may not be enthusiastic. That may be true of other members of the Senate. But if we are to bring about this reform, I believe that there has to be some give and take.

S. 1400 and S. 1. offer Congress its first opportunity in nearly two hundred years to restructure federal criminal law so as to serve the ends of justice better—justice to the individual and justice to society. While it would be unrealistic to assume that every provision of S. 1400 or S. 1 will be viewed with equal favor by all, I do not think it too much to hope that the task of translating the proposals they embody into reality will be approached with quiet reason and in a spirit of true reform. The monumental importance of the undertaking demands no less.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS,
Washington, D.C., February 23, 1973.

HON. JOHN L. MCCLELLAN,
Chairman, U.S. Senate,
Subcommittee on Criminal Laws and Procedure,
Washington, D.C.

DEAR SENATOR MCCLELLAN: The Committee on the Administration of the Criminal Law of the Judicial Conference has been in session over the last three days in its continuing study of the Brown Commission Report and your bill, S. 1, the Criminal Justice Codification Revision and Reform Act of 1973. During this meeting, it came to the attention of that Committee, chaired by Federal District Court Judge Alfonso J. Zirpoli, that your Committee is planning hearings on March 6, 7, and 8, 1973, on the subject (among others) of appellate review of sentences imposed in a limited category of federal criminal cases proposed in S. 1.

After conferring on this subject with the Chairman of the Advisory Committee on Criminal Rules, it was the consensus that a proposed new Rule 35 should be brought to your attention since it suggests an alternative to appellate review of sentences, namely, the designation of a rotating panel of three

United States district judges in each circuit who would review sentences on petition. I enclose a copy of this proposed rule.

I should point out that at this stage, the draft rule is only a proposal that will be circulated to the national bench and bar for comment as soon as it is printed by the Government Printing Office early in March. In accordance with the usual procedure, comments will ultimately be evaluated by the rules committees before any further action is taken. It was thought that this should be brought to your attention since the proposed rule is germane to the subject of your hearing.

Sincerely,

ROWLAND F. KIRKS,
Director.

Enclosure.

Rule 35. Correction or Reduction of Sentence.

(a) *Illegal Sentence.* The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within 120 days after the imposition of the sentence the time provided herein for the reduction of sentence.

(b) *Motion to Reduce Sentence.* The court may A motion to reduce a sentence may be made within 120 days after the sentence is imposed either originally or upon revocation of probation, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal; or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law. An appeal shall not extend the time within which a motion to reduce sentence may be made. The provisions of rule 38 (a)(2) shall not apply to a motion to reduce sentence.

(c) *Review of Sentence.*

(1) *Motion for Review.* Within 30 days after the denial of an application made under subdivision (b) of this rule for the reduction of a sentence which may result in imprisonment for 2 years or more, the defendant may file a motion with the clerk of the district court for a review of the sentence. The motion may be made while an appeal is pending.

(2) *Sentence Review Panel.* There shall be in each district court a sentence review panel. The panel shall be composed of three district judges of the circuit who shall be designated and, if not already members of the court, assigned to the district court for that service by the chief judge of the circuit pursuant to 28 U.S.C. §292 (b) or §294 (c). The members of the panel shall serve for such periods of time as the chief judge of the circuit may designate. The same district judge may be designated and assigned to the sentence review panels of two or more district courts of the circuit at the same time. A district judge of the circuit may be designated and, if necessary, assigned by the chief judge of the circuit as an alternate member of the panel to sit in place of a regularly designated member whenever the latter was the sentencing judge in a case under review or is otherwise unable to sit. The district judge who is first in precedence shall preside over the panel.

(3) *Procedure of Panel.* When a motion is filed for the review of a sentence, the clerk shall forthwith notify the presiding judge of the sentence review panel. The presiding judge shall promptly cause the panel either individually or in joint session to review the sentence. The panel shall consider the papers on file in the case in the district court, including the presentence report, a report of a diagnostic facility, and any other documents which were before the sentencing judge. The panel may direct the preparation of a transcript of all or part of the testimony and other proceedings in the case if required for its consideration. The panel may, in its discretion, permit the attorney for the government and the defendant or his counsel or both to appear before it and present oral argument or file written briefs or do both.

(4) *Powers of Panel: Finality of Decision.* If the panel deems that a sentence under review is excessive, it shall modify or reduce it; otherwise it shall confirm the sentence. The order of the panel modifying or reducing the sentence and amending the judgment of the court accordingly or confirming the sentence, as the case may be, shall be filed in the office of the clerk of the district court and entered in his docket. The order of the panel shall be final and not subject to further review or appeal.

RULE 35. CORRECTION OR REDUCTION OF SENTENCE, ADVISORY COMMITTEE NOTE

Rule 35 is amended to provide a procedure for the review of sentence thought by a defendant to be excessive. The review is to before a panel of three district judges designated by the chief judge of the circuit. The panel is

empowered to modify or reduce a sentence found to be excessive or to confirm a sentence found not to be excessive. The review panel is not empowered to increase a sentence.

Subdivisions (a) and (b) of the proposed rule remain basically the same with two exceptions: A change is made to provide that a motion to reduce a sentence must be made within 120 days, a period not extended (as under the current rule) by the taking of an appeal. A change is also made to make clear that a sentence of imprisonment need not be stayed, under rule 38(a)(2), pending the decision on the motion to reduce a sentence. The objective is to achieve the prompt resolution of any issue relating to the propriety of a sentence. Thus the 120 days runs from imposition of sentence rather than 120 days from the decision on an appeal from the conviction. Both an appeal and a motion to reduce sentence can be taken at the same time. This is made explicit in subdivision (c)(1). Because the proposed rule will make possible the prompt resolution of the sentence issue, rule 38(a)(2) which mandates a stay of a sentence of imprisonment is not made applicable to a motion to reduce a sentence.

Subdivision (c) is entirely new. It provides a procedure for reviewing a trial judge's refusal to grant a reduction of sentence.

Providing for a review of a sentence is recommended by the American Bar Association Standards Relating to Appellate Review of Sentences (Approved Draft, 1968). Section 1.2 of the ABA Standards Relating to Appellate Review of Sentences articulates the purposes of a sentence review procedure (pp. 7-8):

The general objectives of sentence review are:

(i) To correct the sentence which is excessive in length, having regard to the nature of the offense, the character of the offender, and the protection of the public interest;

(ii) To facilitate the rehabilitation of the offender by affording him an opportunity to assert grievances he may have regarding his sentence;

(iii) To promote respect for law by correcting abuses of the sentencing power and by increasing the fairness of the sentencing process; and

(iv) To promote the development and application of criteria for sentencing which are both rational and just.

For a discussion of these objectives, see the commentary to §1.2 at pages 21-31.

Further discussion of the advantages of sentence review is found in Dix, *Judicial Review of Sentences: Implications for Individual Disposition*, 1969 *Law and the Social Order* 369, 369-371; Hruska, *Appellate Review of Sentences*, 8 *Am. Crim. L.Q.* 10 (1969); the President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* 25 (1967); Note, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 *Yale L.J.* 1453, 1461-1462 (1960); *Appellate Review of Sentences, A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit* [1962], 32 *F.R.D.* 249 (1963), Remarks of Judge Kaufman, pp. 260-261.

For discussions of objections to appellate review of sentencing, see Dix, *Judicial Review of Sentences: Implications for Individual Disposition*, 1969 *Law and the Social Order* 369, 371-372; The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* 26 (1967); *Appellate Review of Sentences, A Symposium at the Judicial Conference of the United States Court of Appeals of the Second Circuit* [1962], 32 *F.R.D.* 249 (1963), Remarks of Judge Walsh, p. 276; Brewster, *Appellate Review of Sentences* [1965], 40 *F.R.D.* 79 (1967).

Many states now provide for some form of judicial review of sentences. See, e.g., *Ariz. Rev. Stat. Ann.* §13-1717 (1956); *Conn. Gen. Stat. Ann.* §§ 51-194-51-196 (Supp. 1965); *Fla. Stat.* §932.52 (1969); *Hawaii Rev. Laws* §212-14 (Supp. 1965); *Ill. Ann. Stat. ch. 38, 117-3(e)* (Smith-Hurd 1964); *Iowa Code Ann.* § 793.18 (1950); *Mel. Rev. Stat. Ann.*, tit. 15, §§ 2141-2144 (Supp. 1966); *Md. Ann. Code art. 26, §§ 132-138* (1966); *Mass. Gen. Laws Ann. ch. 278, §§28A-28D* (1959); *Neb. Rev. Stat.* §29-2308 (1964); *N.Y. Crim. Proc. Law* § 450.30 (1971); *Ore. Rev. Stat.* §§ 138.050, 168.090 (1970); *Tenn. Code Ann.* § 40-2711 (1955). The United States military courts also have provisions for the review of sentence, 10 *U.S.C.* §§ 860, 862(b), 863-864, 865(a), 866 (a)-(c), 869 (1964). For further discussion of the availability of review, see *American Bar Association Standards Relating to Appellate Review of Sentences* 13-15 (Approved Draft, 1968).

Subdivision (c) (1) conditions the right to a review of sentence on three things.

First, the sentencing judge must have denied a motion to reduce the sentence under subdivision (b). The sentencing judge is thus given the opportunity to first review the sentence in light of the issue raised by the defendant.

Second, the right of review is limited to those defendants whose sentence may result in imprisonment for two years or more. Contrast the conclusion in ABA standards Relating to Appellate Review of Sentences 18-20 (Approved Draft, 1968). See also discussion of §3.4 in ABA Standards Relating to Appellate Review of Sentences, mainly pp. 61-62 (Approved Draft, 1968). The two-year minimum conforms to that of at least one state which provides for review of sentences. See Md. Ann. Code, art. 26, § 26, (1966). Of the states providing by statute for the review of sentence, only one has a minimum sentence of greater than two years. See Mass. Gen. Law Ann. ch. 278, §28A (1959), providing for a sentence of more than five years to the state reformatory for women. However, Massachusetts also provides for the right of review for all sentences to the state prison. Similarly, see Me. Rev. Stat. Ann., tit. 15, 2141 (Supp. 1966). Several other states have a one-year minimum. See, e.g., Conn. Gen. Stat. Ann. §51-195 (Supp. 1965); 10 U.S.C. §866 (b) (1964) (United States Military Courts). For a criticism of having two classes of convicted persons, see Note, Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study, 69 Yale L.J. 1453, 1464 (1960).

Third, the defendant must make his motion to review within thirty days after a denial of a motion to reduce the sentence made under the provisions of subdivision (b).

Subdivision (c) (2) prescribes the manner for selecting the review panel. The panel consists of three district judges with an additional district judge as an alternate. The alternate will make it possible to exclude from the panel the judge who imposed the sentence being reviewed.

Using a panel of district judges permits those judges most experienced with sentencing to participate in the review process. It thus avoids, as a major objection to review of sentences, the argument that appellate judges are not qualified for the task. See, e.g., Appellate Review of Sentences, A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit [1962] 32 F.R.D. 249 (1963). Remarks of Judge Walsh, pp. 285-286, 28 U.S.C. §292 (b) and §294 (c) are incorporated by reference, into the rule to emphasize the fact that they are the established procedure for appointing a judge from one district to serve in another district or for appointing a senior judge to serve in a district. These provisions are needed because many districts lack the necessary three district judges to constitute the review panel.

Subdivision (c) (3) prescribes the procedures to be followed by the panel. There is no requirement that the panel hold a formal meeting. It is only required that each member of the panel review the sentence. The need for meetings will vary.

The panel is required to consider the papers on file in the district court which were available to the sentencing judge including the presentence report, a report of a diagnostic facility (such as that following a commitment under 18 U.S.C. §4208 (b) or §5010 (e)), and any other written data relevant to sentencing. The panel, at its discretion, may also order the preparation of the transcript of the trial or other proceedings held in the case. The objective is to present to the review panel all of the sentencing information available to the sentencing judge. See discussion, ABA Standards Relating to Appellate Review of Sentences 42-45 (Approved Draft, 1968). The existing rule has been interpreted to impose a limitation of the inquiry to the factual record. See *Semet v. United States*, 422 F.2d 1269 (10th Cir. 1970). The proposed rule contemplates that review will be limited to the factual information in the written record (transcripts, presentence reports, etc.).

The panel is given discretion to hear oral argument and to accept a written brief. The proposed rule is not explicit on the right of a defendant to be represented by counsel during a sentence review procedure. The issue of the constitutional right to counsel is left to future court determination. Compare *Consiglio v. Warden, State Prison*, 153 Conn. 673, 220 A.2d 269 (1966), ruling that review of sentence, as provided under the Connecticut statute, is a critical stage; and *United States v. Birnbaum*, 421 F.2d 993 (2d Cir.), cert. denied 397

U.S. 1044, reh. denied 398 U.S. 944 (1970), holding that constitutional rights are not abridged by absence of defendant's counsel on review of a refusal to grant probation. The Connecticut situation is distinguishable from proposed rule 35 in that Connecticut allows the sentence review panel to increase the sentence originally imposed. Proposed rule 35 allows only a reduction and is therefore not as critical a stage as is the Connecticut sentence review. See *United States ex rel. Smith v. Hendrick*, 260 F. Supp. 235 (E.D. Pa. 1966); aff'd 378 F.2d 373 (1967). Should the review panel request briefs or oral argument, it would seem obviously wise to ensure that the defendant has the advice of counsel. Proposed rule 35 is intended to leave this in the discretion of the sentence review panel in cases where defendant's trial counsel does not carry through with the motion to review sentence. Because a defendant has the right to counsel at the original sentencing, he is thus provided assistance in marshaling factual information and argument relevant to sentencing which will be a matter of record and available to the review panel. Trial counsel also has an opportunity to inform defendant of his right to review of the sentence imposed by the trial judge.

The rule does not attempt to specify what evidence is admissible on the issue of the propriety of the sentence under review. Consider Proposed Rules of Evidence for United States Courts and Magistrates, rule 1101 (d) (3) (Revised Draft 1971), which recommends that the rules of evidence should not apply to sentencing. For interpretation of existing law, see Proposed Rules of Evidence for United States Courts and Magistrates, p. 153 (Revised Draft 1971).

The rule does not require either the sentencing judge or the review panel to give written reasons for the sentence imposed. There is a question as to the usefulness of written reasons for imposing a sentence. The requirement has been criticized as providing unhelpful opinions. See Note, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 Yale L.J. 1453, 1466-1475 (1960); Halperin, *Appellate Review of Sentence in Illinois—Reality or Illusion?*, 55 Ill. B.J. 300, 301 (1966); and *Appellate Review of Sentences, A Symposium at the Judicial Conference of the United States Court of Appeals of the Second Circuit* [1962], 32 F.R.D. 249 (1963), Remarks of Judge Walsh, pp. 282-283. In the view of the Advisory Committee, the contribution made by requiring written reasons is not sufficient to justify the cost in time and money which would be imposed upon the sentencing and sentence review processes. The decision as to when to write an opinion is left to the discretion of the sentencing judge and the review panel. See ABA Standards Relating to Appellate Review of Sentences 50 (Approved Draft, 1968).

Subdivision (c) (4) gives the reviewing panel the power to modify or reduce the sentence under review if the panel deems the sentence to be excessive. In all other cases, the panel must confirm the sentence. The panel is thus without authority to increase the sentence being reviewed. The reasons for not allowing the sentence to be increased include: (1) There seems to be no inherent relationship between those defendants who deserve an increase and those who are likely to take an appeal. Compare *Van Alstyne*, In *Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 Yale L.J. 606, 621-622 (1965). (2) A stigma of unfairness may attach to the review system, outweighing the value gained in the few cases in which an increased sentence is justified. See Report of the Interdepartmental Committee on the Court of Criminal Appeal, Meador Report, Appendix C, p. 142, ABA Standards Relating to Appellate Review of Sentences (Approved Draft, 1968). (3) The power to increase sentence upon appeal by defendant might frustrate the objective of rehabilitation. (4) The sixty years of experience in England with the power to increase sentences led to the conclusion that it does not serve a needed function. See Meador Report, Appendix C, pp. 144 and 157 of ABA Standards Relating to Appellate Review of Sentences (Approved Draft, 1968). (5) There is some question as to whether such a provision would be constitutional. See *Kohlfuss v. Warden*, 149 Conn. 692, 183 A.2d 626, cert. denied, 371 U.S. 928 (1962); and *Hicks v. Commonwealth*, 345 Mass. 89, 185 N.E.2d 739 (1962), cert. denied, 374 U.S. 839 (1963), where the constitutionality of two state review statutes was questioned and yet the statutes withstood the attack. But compare *United States ex rel. Hetenyi v. Wilkins*, 348 F.2d 844, 859-860 (2d Cir. 1965), cert. denied, 383 U.S. 913 (1966); *People v. Henderson*, 60 Cal.2d 482, 35 Cal. Rptr. 77, 386 P.2d 677 (1963). Also see Appellate Review of Sen-

tences, Hearings on S. 2722 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 89th Cong., 2d Sess. 106 (1966) (statement of Professor George). These arguments are discussed in ABA Standards Relating to Appellate Review of Sentences 57-63 (Approved Draft, 1968). To ensure against a flood of frivolous claims, the proposed rule limits the right of review to sentences of two years or more rather than to try to deter frivolous appeals by the threat of an increased sentence. See ABA Standards Relating to Appellate Review of Sentences 61-62 (Approved Draft, 1968).

The rule does not provide for the remand of the case to the sentencing court. To remand a case would slow down the procedure of review. If a sentence is found to be excessive, the panel should correct the defect and issue the final order.

The rule does not impose a duty on the sentencing judge to notify the defendant of his right to move for reduction or review of sentence.

REMARKS OF APPELLATE DIVISION JUSTICE LAWRENCE H. COOKE, BEFORE THE JOINT COMMITTEE ON COURT REORGANIZATION, SUPREME COURT BUILDING, MINEOLA, NEW YORK, SEPTEMBER 24, 1973

Mr. Chairman and Members of the Joint Committee on Court Reorganization, One of the more durable of public concerns in this and recent years has been the subject of reorganizing New York State's court structure. Today's hearing is further evidence of this concern. I thank you for this opportunity, to present some of my thoughts to you on the limited but highly important and complex subject of sentencing the criminal offender; and, in particular, on the problem of unjustified disparity in criminal sentencing, a phenomenon which has been accurately described as the "most persistent and perplexing problem in the entire field of criminal jurisdiction."

In 1923 a fresh-faced farm boy and an older ex-convict attempted to rob a grocery store in Mooresville, Ind. The youth bungled his role, and police soon captured the pair.

The youth, a first offender, pleaded guilty in court on the advice of his father. He was sentenced to 10 to 20 years in jail. His more experienced associate, who had planned the robbery, was luckier: he went before a different judge and got only two to 10 years.

While in prison, the youth smoldered with resentment over his clearly inequitable sentence. He began to speak of getting even for the "raw deal" he had gotten from the judge. After nine years he was paroled, an embittered man. He formed a gang that in a few short months looted Midwestern banks of \$300,000 and killed 15 men. FBI agents shot him to death outside a Chicago theater on July 22, 1934. His name was John Dillinger.

The process of sentencing, its objectives and methodology, is a subject which has long concerned me, often confounded me, and always intrigued me—in my days as a practicing lawyer, later on the trial bench on the County and Supreme Courts; and, more recently, as an Associate Justice of the Appellate Division—a court, whose responsibilities, as you know, included the review of sentences imposed within the boundaries of the 28 counties comprising the Third Judicial Department.

One of the major goals of court administration, shared by our Court and the Administrative Board of the Judicial Conference, has been the adoption of uniform standards, policies, rules and procedures, both administrative and judicial. As a member of the Appellate Division, I have had the opportunity to represent our Court and the Third Department on two special committees established by the Administrative Board and charged with the formulation of statewide uniform procedures: one in the area of admission of new attorneys; and the second—at the other end of the spectrum—the discipline of errant attorneys. During the course of these assignments, and because of the many hundreds of criminal cases that have come before me, during my past terms on the County and Supreme Courts and now on the Appellate Division, it has occurred to me that the administration of justice in New York State could be equally well served by bringing statewide uniformity to the sentencing of criminal offenders as well. By "uniformity", let me add, I do not mean a standard sentence for each specific

crime. No one can seriously argue for uniformity where there exist reasonable grounds for differentiation. Our goal should be reasonable and rational—rather than arbitrary—differentiation in the formulation and execution of sentences.

As many of you have read, it was observed during the public hearings of the McKay Commission, investigating the events of Attica, that the disparity of criminal sentences for like criminal offenses by like criminal offenders is considered to be a significant factor contributing to prisoner unrest in our State's correctional facilities. But, and more tragically, such disparity is plainly and simply an injustice, and it defeats one of the principal goals of our correctional system: the effective rehabilitation of the individual offender and his successful reintegration into society upon the completion of his term. One jurist, (Judge Marvin Frankel) in a recent book has noted that "our sentencing practices are essentially lawless, and this regime of unregulated power is a source of hatred and contempt, rather than respect, for the law."

A recent study by the *New York Times* indicated the following patterns in New York State among our 12,500 sentenced defendants in state prisons:

- harsher sentences for defendants with assigned counsel than for those with private counsel;
- longer prison terms for nonwhites than for whites;
- differences in sentences between those convicted in New York City's local courts and those convicted for the same crimes upstate, with those upstate getting more severe sentences.

James Bennett, an eminent penologist and the former Director of the Federal Bureau of Prisons tells of the middle-aged tax accountant, who on tax fraud charges, received 31 years and 31 days in consecutive sentences to an institution, while an unstable young man served out a 98 day sentence for armed bank robbery at the same place. In an article in the *Wall Street Journal*, he graphically pinpointed the problem by citing the example of two convicted embezzlers sentenced to the Federal penitentiary in Atlanta. Both were family men without prior criminal records. One had embezzled \$24,000 from a credit union. He was sentenced to 117 days in prison. The other embezzled slightly more from a bank. He got 20 years.

Mr. Bennett observed: "This occurs all too often, and each time we're in trouble. Unjustified disparity so completely discourages a man that he won't participate in any rehabilitation program. He has no motivation, no goal—plus he's usually a discipline problem."

From personal experience, I can think of no decision in the judicial process as important, or as complicated and as difficult, as the conscientious formulation of a criminal sentence. The objectives, are more easily stated than achieved: to punish the offender; to protect the public from him, if necessary; to deter others from like criminal activity; and, equally important, to lay the foundation for his eventual rehabilitation within the correctional process.

There is a dilemma for the judge in that process, however—an unescapable dilemma which lies in the fact that sentencing is basically an act of prediction, so that the role of the sentencing judge is akin to the function of a prophet. Unfortunately, the elevation of a man to the bench—even with the unanimous advice and consent of the Senate, or the unanimous support of the electorate—gives him no greater powers of prophecy, no greater wisdom or compassion, than he possessed the previous day as a practicing lawyer. And beyond that, it is a sobering and indeed frightening responsibility to sit in judgment over a fellow man. In this regard, I am often reminded of a remark once made by Learned Hand in discussing that responsibility. "Here I am," he said, "an old man in a long nightgown making muffled noises at people who may be no worse than I am."

When one considers that in this multi-faceted State of New York, a state possessing a variety of communities ranging from urban to rustic, there are several hundreds of judges who are products of widely different regional and personal backgrounds, the odds that rational uniformity will result in the thousands of sentences imposed annually seem remote—indeed, even to the most casual observer. This, then, is the major and basic problem of sentencing. And while it may be the reality that disparity in sentencing, which by itself involves so many variables, defies exact solution, I do believe that there exist realistic and workable alternatives, which can and should be explored, and which deserve your attention.

To deal first with an extreme solution, I would call to your attention the proposal advanced by many, including eminent jurists, that the trial judge's

role in the criminal justice process should be limited to presiding over the determination of a defendant's guilt or innocence—leaving to a board composed of persons thoroughly trained and experienced in the problems of criminology and the behavioral sciences the responsibility for determining the nature and duration of corrective treatment in each case. It has been argued that this would not amount to an abdication of any essential judicial responsibility; but would rather, give recognition to the inherent limitations in the present system and to the professional expertise that has evolved in special areas of discipline and science in the 20th Century.

But the trial judge, because of his familiarity with the facts of each proceeding and his opportunity to observe the defendant and the witnesses for and against him, should there be a trial, is in an advantageous position and has much to contribute. Certainly, the worthy objective of infusing into the sentencing process competent professional judgment, based on the increasing scientific knowledge of human behavioral characteristics, can be equally well accomplished by obtaining, for use by the trial judge, through presentence reports from probation officers or, possibly, even others with qualifications equal to those of the proposed sentencing board members.

Another proposed solution advanced by many experts, including, most recently, the distinguished Chief Judge of the Second Circuit Court of Appeals, has been the creation of three judge sentencing councils which would discuss and review proposed sentences and thus help achieve rational uniformity. Under existing judicial machinery, sentencing panels are a good idea, because they recognize that there is a problem, because they will ameliorate the difficulty, but, with all due respect, they will not cure the situation.

Sentencing panels are a step in the right direction because they would alleviate existing disparities where similar offenders, sentenced in two courtrooms in the same courthouse, receive perplexingly different sentences. However, this solution is a limited one. While it might eliminate unjustified differences within an area where one panel operates, it would leave relatively untouched the problem of disparity between one sentencing panel and another. And, as suggested earlier, the counterproductive effects of disparity are fostered in state prisons where the inmates have been processed by different sentencing courts, regardless of locality.

It is believed most strongly that the *only* proposal which offers the hope of a definitive solution to this problem is the establishment of a *special* sentence review court of statewide jurisdiction over felony sentences imposed by trial judges, either with or without the assistance of the three judge sentencing councils.

I first proposed such a court in May, 1972, before the Albany Chapter of the Young Lawyers Section of the New York State Bar Association. I subsequently presented my proposal to the New York State Assembly Codes Committee in September, 1972. Since that time, Assemblyman Antonio Oliveri and Senator Carol Bellamy have introduced legislation calling for a constitutional amendment in the State Legislature to make this proposal a reality.

As I envision it, the powers of this felony sentence review court would be invoked upon application of either the defendant or the state. While I do not intend, at this time, to detail the structure and operation of the court, believing that it is more important that we accept in principle the necessity for it some suggestions are in order. This review court could be structured along the lines of an Appellate Division and staffed by experienced trial judges designated from the Supreme Court, County Courts, and possibly, the New York City Criminal Court. It would be required to study and utilize, among other things, the written report of the sentencing judge setting forth reasons for each disciplinary term, the trial record and comprehensive pre-sentence reports prepared by able probation personnel.

Since the role of the trial judge would still be of vital importance in the sentencing process, it follows that we must continue to improve the sentencing tools, techniques and aids provided by law to assist him in the wise exercise of his judgment. We must evolve a system of orderly, rational and detailed guidelines for the imposition of fair, uniform and humane sentences which would accomplish their intended purposes. Of particular value in this regard would be continuing Institutes on Sentencing—for judges of superior courts with criminal jurisdiction—think tanks, if you will, providing the opportunity for judges, probation and correction personnel to share their experiences, with a view toward the development of meaningful and comprehensive criteria for sentencing. While

these Institutes are presently authorized by the Judiciary Law, unfortunately they have not been held with sufficient frequency to have had their full impact on the sentencing process, an impact which could be highly beneficial. I might add that observers at such a gathering held last fall noted that the judges present were most desirous of obtaining some type of yardstick for sentencing criteria.

The concept of this type of court is not without precedent. It is similar to the existing practice in the United States military court system, and it has been embodied in various forms in statutes creating specialized sentence review courts or panels in Massachusetts, Connecticut, Maine, and most recently, in Maryland. It differs from our current system in that it overcomes the limitations on the power of the four Appellate Divisions to review sentences, a power that allows us only to modify an excessively harsh sentence where there has been an abuse of discretion by the trial judge. It should be kept in mind that the Appellate Divisions are not the state courts to end disparity since, if for no other reason, there are four of them, each dealing with different geographical areas in this most heterogeneous state of ours.

Of the potential salutary effects of having such a statewide sentence review court, several come to mind. The first, of course, would be greater rationality and uniformity in sentencing. This benefits the entire criminal justice system, as well as the individual criminal defendant, by reinforcing its integrity through the strengthening of its rational elements and the limitations of its subjective elements. Another salutary benefit would be the likely reduction of legally frivolous appeals based solely on the alleged excessiveness of sentences. Comprehensive sentencing criteria would result from the mandatory "Institutes on Sentencing". The correction system would benefit from the elimination of a major barrier to effective rehabilitation and source of prisoner discontent—once this new forum for airing grievances is provided. Also, the existence of such a court would go a long way toward eliminating the practice—and resulting delay—in our more populous counties of maneuvering, whether by the defense or the People, to get a case before either a lenient or a harsh judge for disposition and sentencing.

If the argument be advanced that such a plan would be too onerous a task to impose on such a review court, let me point out that consultations with judicial officials in Connecticut, Maine, Massachusetts and Maryland indicate that their review systems have not resulted in any inundation or caused any undue burden. Also, it is likely that, once this court is in operation for a long enough period of time so that standards are established, the number of appeals taken will level off. Furthermore, while it is not my purpose to argue the pros and cons of plea bargaining, it is a known fact that the vast majority of dispositions in criminal cases come about because of such arrangements, in which cases neither side is likely to complain of the sentence imposed. If the sentence is greater than agreed upon, defendant already has a means of recourse by way of *coram nobis*.

Neither am I here to discuss the advisability of mandatory minimum sentences,—which would merely prescribe the least punishment to be imposed,—but I do wish to point out that laws requiring their imposition would not remove disparity in sentences. While there would be a level below which a court could not go, the sentences meted out would still not necessarily be the same and,—if indeterminate sentences would be provided for,—the maximum sentence of the indeterminate sentence very likely would show a lack of uniformity.

Finally, let me conclude my remarks on this subject with the statement once made by Mr. Justice Jackson, at a time when he was Attorney General of the United States: "It is obviously repugnant to one's sense of justice that the judgment meted out to an offender should depend in large part on a purely fortuitous circumstance; namely, the personality of the particular judge before whom the case happens to come for disposition."

Let us hope that in the not too distant future, we can all take pride in the fact that Justice Jackson's complaint was heeded; and that the evil of which he spoke was remedied by an enlightened legislature and a concerned public.

You have considerable power to mobilize support for the only concrete proposal that will remedy what is now widely recognized as a major problem in our criminal justice system—a source of injustice that must be eliminated. If we are willing to recognize that disparity in criminal sentencing is a problem, I submit that this review court is the most practical solution. Through your activities in communicating with the public and Legislature you can contribute significantly in making this proposal a reality. Thomas Jefferson set the stage for action when he called for "Equal and exact justice to all men"; and I might add—with privilege to none.

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